FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 37.

NATIONAL COTTON OIL COMPANY ET AL.,
Plaintiffs in Error,

vs.

STATE OF TEXAS.

No. 38.

SOUTHERN COTTON OIL COMPANY ET AL.,
Plaintiffs in Error,

vs.

STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR THE PLAINTIFFS IN ERROR.

WILLIAM V. ROWE,
RALPH OAKLEY,
JAS. A. BAKER,
R. S. LOVETT,
Counsel for Plaintiffs in Error.

C. G. ROBERTSON, Walker and Centre Streets, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1904.

NATIONAL COTTON OIL COMPANY ET AL., Plaintiffs in Error, vs. STATE OF TEXAS.	No. 37.
SOUTHERN COTTON OIL COMPANY ET AL., Plaintiffs in Error, vs. STATE OF TEXAS.	No. 38.

BRIEF FOR THE PLAINTIFFS IN ERROR.

Statement.

These suits were instituted in the name and on behalf of the State of Texas by the Attorney General and by the District Attorney of the Twenty-sixth and Fifty-third Judicial Districts against the National Cotton Oil Company and the Southern Cotton Oil Company, respectively, foreign corporations, to forfeit the license granted each of them to transact business in the State

for alleged violation of the anti-trust statutes. The complaint in both cases is based upon the same transaction and the facts and the questions involved are identical. The State's amended petition, upon which the cases were tried, are alike, except in the designation of the defendant, that in case No. 37 upon this docket, being as follows (R., 1–3):

> "I. That the National Cotton Oil Co. is a corporation duly organized, chartered and existing under the laws of the State of New Jersey, and that said company is duly authorized and empowered to do and transact business in the State of Texas by reason of a permit heretofore, to wit, on the 2nd day of May, 1900, issued to it by the State of Texas, authorizing it to transact business in this State in accordance with its charter and with the Constitution and laws of the State of Texas, which corporation has been heretofore duly cited in this case and answered therein.
>
> "That the Southern Cotton Oil Company is a corporation duly organized, chartered and existing under the laws of the State of New Jersey, and that said company is duly authorized and empowered to do and transact business in the State of Texas by virtue of a permit heretofore, to wit, on the 3rd day of June, 1897, issued to it by the State of Texas, authorizing it to transact business in this State, in accordance with its charter and with the Constitution and laws of the State of Texas.
>
> "That the Taylor Cotton Oil Works is a corporation duly organized and existing under and by virtue of the laws of the State of Texas, by virtue of a charter granted by the State of Texas on the

25th day of August, 1898, authorizing and empowering it to transact business as such corporation, in accordance with its charter and with the Constitution and laws of the State of Texas.

"II. That each of said foreign corporations were, from the time of the issuance of the permits authorizing them to do business in the State of Texas, and has ever since been and is still, and that said Taylor Cotton Oil Works, from the date of its charter, has been and is still engaged in the business of the manufacture and sale of cotton seed oil, cotton seed meal and other by-products of cotton seed; that the business in which each and all of such corporations were engaged necessitated the purchase of cotton seed, from which the products which they manufactured and sold were made, and that said cotton seed was an article and commodity of merchandise.

"III. That heretofore, to wit, on or about the 1st day of November, 1901, and on each and every day prior and subsequent thereto since the second day of May, 1900, said corporations were and have been engaged in the business of buying cotton seed in the various counties of the State of Texas; that on or about the 1st day of November, 1901, the National Cotton Oil Company made and entered into a combination with each of the other of said corporations, and that each of the other of said corporations made and entered into a combination with the said National Cotton Oil Company and with each other, and that each of said corporations made and entered into a combination with various other persons, firms and corporations, whose names are to the plaintiff unknown, and that said corporations became members of and parties to a pool, trust, agree-

ment, confederation and understanding with each of the other of said corporations, firms and persons, whereby they did, each for itself and with each other, and all together, agree to regulate and fix, and did regulate and fix the price at which they would buy cotton seed; that they especially regulated and fixed the price of cotton seed throughout the State of Texas at $14.00 per ton, and agreed amongst and with each other that they would not give more than said $14.00 per ton for cotton seed in any of the towns and communities of the State of Texas.

"IV. That by creating and entering into and becoming a member of and a party to such pool, trust, agreement, combination, confederation, and understanding with said other persons, firms and corporations aforesaid, and by maintaining the agreement to regulate and fix the price of cotton seed aforesaid, the defendant was guilty of a violation of the laws of the State of Texas.

"That the defendant in consequence of the acts hereinbefore complained of, has forfeited its permit to transact business in the State of Texas.

"Wherefore, premises considered, plaintiff prays, defendant having already answered herein, that it have judgment canceling and forfeiting the permit heretofore granted to the defendant authorizing it to do and transact business in the State of Texas, and the defendant enjoined from transacting business in the State of Texas, for costs, and for all other and further relief to which plaintiff may be entitled in law or in equity."

The defendant did not deny the facts thus alleged, but demurred to said petition upon the grounds, (1) that

the petition was insufficient in law to entitle plaintiff to the relief sought; (2) that there was no valid law of the State prohibiting the acts charged; (3) that the anti-trust statute of 1889, and the provisions of the Revised Penal Code based thereon, were in contravention of the Federal Constitution; (4) that the anti-trust statute of 1895, and the provisions of the Revised Civil and Penal Codes based thereon, were also in contravention of the Federal Constitution; (5) that the anti-trust statute of 1899 was also in contravention of the Federal Constitution; and (6) that the anti-trust statute of 1899 was not enacted in conformity with the State Constitution (R., 3–6).

All the demurrers were overruled, and defendant declining to further answer, judgment was rendered in favor of the State in accordance with the prayer of its petition, forfeiting, revoking and canceling the license which had been granted defendant to transact business, and enjoining it from transacting any business in the State of Texas except such business as may be and constitute interstate commerce; and the costs of the suit were also adjudged against defendant (R., 6–7).

Defendant excepted to the judgment and appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas where, on February 4, 1903, the judgment was affirmed upon authority of the *State* v. *Shippers Compress & Warehouse Co., 95 Tex., 603* (R., 11–14).

Application for writ of error to the Supreme Court of Texas was duly made, but was refused April 2, 1903 (R., 20) whereupon application for writ of error from

this court was duly made, and was allowed by the Chief Justice of the Court of Civil Appeals April 22, 1903, (R., 26–27) and in this court errors in the rulings of the Court of Civil Appeals were assigned as follows (R., 23–24):

> "FIRST. In failing to sustain and in overruling plaintiff in error's first assignment of error, reading as follows: 'The court erred in overruling defendant's demurrer numbered III, to plaintiff's petition, based upon the ground that the act of the legislature of the State of Texas, entitled 'An act to define trusts and to provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas,' approved March 30th, 1889, and articles 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987 and 988 of the Penal Code of the State of Texas, based upon said act, are in contravention of that provision of section 1 of article XIV. of the amendments of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.'
>
> "SECOND. In failing to sustain and in overruling plaintiff in error's second assignment of error, reading as follows: 'The Court erred in overruling defendant's demurrer numbered IV. to plaintiff's petition, based upon the ground that the act of the legislature of the State of Texas, entitled 'An Act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and

to promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act,' approved April 30th, 1895, and articles 5313, 5314, 5315, 5316, 5317, 5318, 5319, 5320 and 5321 of the Revised Statutes of Texas, and 988*a*, 988*c*, and 988*d* of the Penal Code of said State, based upon said act of April 30th, 1895, are in contravention of that provision of section 1, article XIV of the amendments of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

"THIRD. In failing to sustain and in overruling plaintiff in error's third assignment of error, reading as follows: "The court erred in overruling defendant's demurrer numbered V to plaintiff's petition, based upon the ground that the act of the legislature of the State of Texas, entitled, 'An Act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles, to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations, that violates the terms of this act, and to authorize the institution of prosecutions and suits therefor', approved May 25th, 1899, is in contravention of that provision of section 1 of article XIV of the amendments of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"FOURTH. In affirming the judgment of the district court and not reversing said judgment."

Brief of Argument.

The State of Texas has enacted five so-called anti-trust statutes, all of which are printed in full as an appendix to this brief. The first was enacted March 30, 1889 (*Gen. Laws 1889, p. 141*). It was entirely supplanted by the Act of April 30, 1895 (*Gen. Laws 1895, p. 112*). But notwithstanding such repeal, the Act of March 30, 1889, was carried, as a whole, into the *Penal Code* of 1895 as Articles 976–988. The first five sections of the Act of April 30, 1895, are a substantial reproduction of the first five sections of the Act of 1889, except that the Act of 1895 was extended so as to prohibit agreements creating restrictions in "aids to commerce", and "in the full and free pursuit of any business authorized or permitted by the laws of this State." Section 6 of the Act of 1895 literally reproduces Section 1 of the same act, defining trusts, and then prescribes a penalty for those entering into such combinations. The remaining sections of the Act of 1895 are substantial reproductions of corresponding sections of the Act of 1889.

Sections 1, 2, 3, 4, 5, 10, 11, 12, 13 and 14 of the act of 1895 were carried into the *Revised Statutes* of 1895 as Articles 5313, 5314, 5315, 5316, 5317, 5318, 5319, 5320, 5321, and 5321a. Sections 6, 7, 8 and 9 were carried into the *Penal Code* of 1895 as Articles 988*a*, 988*b*, 988*c*, and 988*d*. Articles 5318 of the *Revised Statutes* (being Section 10 of the Act of 1895) was amended by the Act of June 5, 1899 (*Gen. Laws 1899, p. 310*) so as to increase the minimum penalty from $50

to $200 per day, but Articles 981 and 988*a* of the Penal Code, which also fixed the minimum penalty for a violation of the act at $50, were not amended; nor did the amendatory act of June 5th, 1899, refer in terms to the anti-trust act of 1895, from Section 10 of which Article 5318 R. S. was taken. But these particular blunders are not material in this case.

Section 13 of the Act of 1889 provided that said act should not apply to agricultural products or live stock while in the hands of the producer or raiser; and the same exemption was renewed by Section 12 of the Act of 1895, with the addition that said act should not be construed to prevent the organization of laborers for the purpose of maintaining any standard of wages. Section 13 of the Act of 1889 was carried into and now appears as Article 988 of the *Penal Code* revised in 1895, and Section 12 of the Act of 1895 was carried into and now appears as Article 5320 of the *Revised Statutes* of 1895.

The act of May 25th, 1899 (*Gen. Laws 1899, p. 246*) contains no repealing clause, but declares in Section 14 that

> "The provisions of the foregoing sections and the pains and penalties provided for for violations of this act shall be held and construed to be cumulative to all laws now in force in this State."

It is, therefore, a mere supplement to the previous anti-trust statutes which, in the meantime, had been incorporated into the Revised Civil and Penal Codes.

The last anti-trust act was passed after the commencement and decision of this case in the court below,

and was approved and became effective March 31, 1903 (*Gen. Laws 1903 p. 119–123*). That act was undoubtedly passed because the Acts of 1889 and 1895 were clearly invalid, as to individuals at least, under the decision of this court in *Connolly vs. Union Sewer Pipe Co., 184 U. S., 540*, and as to corporations also, as we believe, notwithstanding the decision in *State vs. Shippers Compress & Warehouse Co., 95 Tex., 603;* and it was also generally believed that the Act of 1899 would fall with the Acts of 1889 and 1895, to which it was merely a supplement.

The Act of 1903 was intended to supersede all prior acts upon the subject, which were deemed unconstitutional, or likely to be so held, and to eliminate the discriminating features in favor of agriculturalists, stock raisers and laborers which had nullified the previous acts. Section 17 of the Act of March 31, 1903, expressly repealed all prior anti-trust statutes of the State by particular reference thereto, but contained this most unusual proviso, to-wit:

> "Provided nothing in this act shall be held or construed to affect or destroy any rights of the State of Texas to recover penalties or forfeit charters of domestic corporations or to prohibit foreign corporations from doing business in this State for acts committed before this act takes effect."

This provision was undoubtedly prompted by the decision of the Supreme Court of Texas in *State vs. Shippers Compress & Warehouse Co., 95 Tex., 603*, to the effect that the Acts of 1889 and 1895 were entirely valid as

against corporations, although void as against individuals. This case, however, does not involve the validity or effect of such provision, since it arose and was decided before the provision was enacted.

After the Act of March 31, 1903, was passed and on April 27, 1903, the Supreme Court of Texas in *State vs. Laredo Ice Co., 96 Texas., 461*, held the Act of May 25, 1899, valid in an opinion of less than a page devoted to the point and without advancing a single reason or citing an authority to sustain the ruling.

First Point.

THE ACTS OF 1889 AND 1895 ARE IN CONTRAVENTION OF SECTION 1, ARTICLE XIV. OF THE AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, AND THEREFORE VOID, BECAUSE OF THE PROVISIONS PERMITTING AGRICULTURISTS, LIVE STOCK RAISERS AND LABORERS TO FORM COMBINATIONS DENOUNCED BY THE ACTS WHEN FORMED BY OTHERS.

Section 13 of the Act of March 30, 1889, reads as follows:

> "SECTION 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

The substance of this section was carried into the *Penal Code* of 1895 as Article 988.

Section 12 of the Act of April 30, 1895, reads as follows:

> "SEC. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State, provided this act shall not be held to apply to live stock and agricultural products in the hands of the producer or raiser; nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages."

The substance of this section was carried into the *Revised Civil Statutes* of 1895 as Article 5320.

Section 9 of the Illinois Act considered by this court in *Connolly vs. Union Sewer Pipe Co., 184 U. S., 540*, reads as follows:

> "SECTION 9. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

Thus it appears that Section 9 of the Illinois Act is a literal copy of Section 13 of the Texas Act.

Since this court held in *Connolly vs. Union Sewer Pipe Co.*, that the discrimination resulting from Section 9 of the Illinois Act rendered that act unconstitutional and void, it follows, of course, that the Texas Act of 1889 is likewise void; and since the same discrimination, but extended so as to include laborers, is embraced in Section 12 of the Texas Act of 1895, the latter act falls clearly within and is equally condemned by that case. This is so obvious that further comment is unnecessary.

Second Point.

BY THE ACTS OF 1889 AND 1895, WHICH WERE CARRIED INTO THE REVISED STATUTES AND PENAL CODE, THE LEGISLATURE EXEMPTED CERTAIN CLASSES FROM PUNISHMENT FOR THE SAME OFFENCE CHARGED IN THIS CASE, AND, SUCH DISCRIMINATING PROVISIONS BEING UNREPEALED AND UNAFFECTED BY THE ANTI-TRUST ACT OF 1899, THE WHOLE SYSTEM OF STATUTES IS, AS A CONSEQUENCE, UNCONSTITUTIONAL.

After this case was decided finally in the State courts and a writ of error was allowed to this Court, the Supreme Court of Texas, in State vs. Laredo Ice Company, 96 Texas, 461, held that the anti-trust Act of 1899 did not incorporate the exemption clause of the Acts of 1889 and 1895, and was, therefore, valid; and it may be argued that this Court is bound by this decision of the State Court.

But it would seem to be a sufficient answer to this argument to point out that the Supreme Court of Texas *held that all these acts exist, harmoniously*, and did not hold, nor has any court of that State held, that agriculturalists, stock raisers and laborers, who are exempted, by the Acts of 1889 and 1895 and by the provisions of the Revised Statutes and Penal Code, from the penalties prescribed by those acts, may, nevertheless, be subjected to the same penalties under the Act of 1899 for doing the things they were authorized to do by the Acts of 1889 and 1895.

There would be some force in such contention, if it should appear that, in some indictment or prosecution

against a farmer, cattle raiser, or laborer, the Supreme Court of Texas had held that the penalties prescribed could be inflicted under the Act of 1899, notwithstanding the fact that the Acts of 1889 and 1895, and the Revised Statutes and Penal Code, expressly provide that the defendants should be exempted therefrom. But neither the Supreme Court of Texas nor any other court of that State has so held, and we apprehend that no court of any State has ever held, or is likely to hold, that a prosecution on behalf of the State can be maintained and punishment be inflicted against an individual, when there is an unrepealed statute of the State declaring that no prosecution shall be maintained and no punishment shall be inflicted against such individual for the act charged.

There are no common law offences in Texas. From the earliest days the following statute, which now appears as Article 3 of the Penal Code, has been in force in Texas, viz.:

> "In order that the system of penal law in force in this state may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense and a penalty is affixed thereto *by the written law of this state.*"

In any State, it is for the Legislature to determine whether a given act shall be an offence punishable under the laws of the State. The Legislature defines the offence and prescribes the punishment therefor. It may define the unauthorized taking of certain articles

as theft, punishable in a certain way, but if it should further provide that a specified class of persons should not be subject to such punishment, it would be for the courts to determine whether the discrimination amounted to a denial of the equal protection of the laws. If it should be found that such discrimination was unconstitutional, the Court could not go further than hold that those subject to the terms of the statute could not be punished while favored classes were exempt. The Court could not disregard the exemption, and punish alike the exempt and the unexempt, for that plainly would be legislation by the Court. If that were permissible, no objection to any statute under the provisions of the Constitution guaranteeing the equal protection of the laws, could be maintained, for the Court would answer, that prosecutions should be entered against the favored classes, in disregard of the provisions exempting them. Of course, any such views is inadmissible.

When a proceeding is commenced by virtue of a statute forbidding certain acts, the defendant has the right, under the Constitution, to defend upon the ground that the Legislature has arbitrarily exempted other classes from punishment for the acts charged against him and that in so doing, the State has denied him the equal protection of the laws; and the *form* of the legislation is, of course, immaterial, whether it be in one or several acts, *so long as the discrimination exists.* If it is the desire of the Legislature effectively to probibit and punish the acts in questions, it must do so by legislation enacted in conformity with the Con-

stitution, and applying to all persons alike. The Legislature may be unwilling to punish all persons, and, if not permitted to select certain classes, it may be unwilling to enact the legislation at all. Obviously, that is a question for the Legislature to determine. The duty of the Court is limited to the enforcement of the constitutional right to the equal protection of the laws, when that right is asserted by a defendant charged with the violation of a statute containing discriminating provisions. If the discrimination is found to exist, the defendant is entitled to a discharge, and it is then for the Legislature to determine whether it will eliminate, by further legislation, the discriminating provision. It certainly cannot have the punishment inflicted, so long as there is unrepealed upon the statute books an Act of the Legislature declaring that certain favored classes shall not be subject to punishment for the acts prohibited.

Before discussing its bearings upon the Federal question involved, we shall now demonstrate, with greater particularity, that the highest Court of Texas has not in fact passed on the question of statutory construction here presented, and that the question is wholly open in this Court.

In State of Texas vs. Laredo Ice Co., it appeared that the defendant corporation was sued—

> "for the purpose of recovering penalties for a violation of the Anti-Trust Law of *1899*."

The sole question argued and decided was whether the 14th Section of the Act of 1899, to which we have referred, in terms declaring that that Act

> "shall be held and construed to be *cumulative of all laws now in force in this State*,"

had the effect to make that Act

> "a part of the Act of 1895 and to *incorporate* into the Act of *1899* the proviso of Section 12 of the Laws of 1895" (96 Texas, at p. 466)

which created the unlawful exemption in effect condemned by this Court in *Connolly vs. Union Sewer Pipe Co.*, 184 U.S., 540. The Court, while in terms and effect admitting that both acts were to be construed together as *in pari materia and parts of a common system or policy*, held that they were "*not one and the same law*," that the term "cumulative" did not indicate that the Legislature intended an *actual physical consolidation* of the two statutes into one, and that, therefore—a *conclusion* which by no means followed, and which we now controvert—the Act of *1899* was constitutional. The whole opinion of the Court on this point is as follows (at p. 466):

> "The fourteenth section of the act of 1899, concerning trusts and monopolies, is in this language: 'The provisions of the foregoing sections, and the fines and penalties provided for violations of this act shall be held and construed to be *cumulative of all laws now in force* in this state.' Counsel for appellee earnestly contends that the effect of this provision is to *consolidate and to make one law* of the act of 1895 and the act of 1899, and thereby to give exemption from prosecution under the laws of 1899 to those persons who are exempted by the provisions of the law of 1895. *The term 'cumulative' indicates an harmonious co-existence and*

> *co-operation*, rather than a consolidation of two things into one. An amendment to a statute is not 'cumulative,' because it repeals and takes the place of the part of the law that it amends, thereby becoming a part of the law amended. It is true, that in seeking the meaning of language used in a statute, it is proper to consider all of the acts of the same legislative body which are *in pari materia*, because 'it is supposed that there has been no change in the legislative intent and purpose,' unless it is manifested by some change of language (Sutherland, Stat. Constr., Sec. 283). But this is a rule of construction, merely, and *does not constitute each act a part* of every other act on the same subject. Laws which are said to be *in pari materia are parts of a common system or policy, but are not one and the same law.* Counsel press that rule of construction with force and earnestness, stopping little short of the logical conclusion that an unconstitutional provision in one of many laws on the same subject would destroy all of those laws."

In other words, all that the Court there *held* was that the Legislature had not made the objectionable exemption clause, in the Act of 1895, a physical *part* of the Act of 1899, and had not, by the "cumulative" provision in the latter act, effected a complete physical *consolidation* of the two statutes. It will be observed that this was an extremely narrow and technical view, from which the Court's conclusion, supporting the act, did not necessarily follow.

Although, as appears (96 Texas, at p. 462), the Attorney-General argued that the two acts were inconsistent and that the Act of 1899 necessarily repealed

the Act of 1895, the Court effectively negatives that contention, by admitting that the acts were parts of a common system and *in pari materia*, and declaring, *that both had been left by the Legislature intact as parts of such a system, and had not been consolidated.*

Not only did the highest Court of the State thus plainly refuse to hold that the Act of 1899 had worked any repeal of former laws, but the Legislature of 1899, also, by the Act of June 5, 1899 (p. 310 of the Acts of 1899), passed ten days after the anti-trust Act of 1899, expressly recognized and affirmed the continued existence of the provisions of the Act of 1895, as incorporated in the Revised Statutes, by amending a section of that law as thus revised. This is a demonstration of the legislative intent to continue all these statutes in force as parts of the same system.

This is an important fact and leaves the broad question entirely open and undetermined.

It is to be observed that the State Court did not hold that the statute of 1899 had repealed the statute of 1895, which had been incorporated into the Penal Code and the Revised Statutes, creating and punishing this same offence; nor that it in turn created a different offence, differently punishable, and that the statutes were therefore not a part of a common system; nor that the exemption clause in the Act of 1895 and in the Penal Code and Revised Statutes was for any reason inoperative in respect to the Act of 1899.

The State Court did not so hold. *It did not*—and this is a vital point in this connection—pass on the nature, scope and punishment of *the offence* created and

punished by *all* of these laws, but limited itself to the Act of 1899 and to what was included within the four corners of *that act* as a single part of the system of laws in question, for the defendant was there charged with a violation of that act alone. The Court did, however, in terms, declare the continued existence of *all* of the provisions of law, including the Act of 1899, as *parts* of the common system of laws of the State of Texas on this subject.

In the case at bar, on the other hand, the petition charges the defendant with a violation of "*the laws*" (meaning either the Acts of 1889, 1895 or 1899) of the State of Texas, *not*, as in *The Laredo Ice Company case*, with a violation of the Act of *1899*.

In this case, therefore, we are confronted with the question (*not before the State Court in that case*) as to whether "*the laws*" of the State of Texas, *all* creating and punishing the *offence* with which we are charged, are a constitutional and valid *system of laws*.

In the *Laredo Ice case*, the Supreme Court of Texas recognized and affirmed the existence of that system. It simply held that a single *existing* provision of *one part* of the system (the exemption clause) had not been physically *incorporated in* and *consolidated with* another *existing* provision (the Act of 1899), constituting *another part* of the system, and that was the only question presented to and decided by that Court, the petition in which had to do, as we have seen, solely with a violation of the single Act of *1899*.

Assuming, then, for the moment, that the statutes of 1889, 1895 and 1899, with the provisions of the Penal

Code and of the Revised Statutes, which incorporate the provisions of the two earlier statutes, create and punish *the same act or offence*, we find that, in this case, we are punished for an alleged *offence* committed under *those laws, referred to in the petition, generally and without specification*, and we also find that, under Article 988 of the Penal Code and Article 5320 of the Revised Statutes of 1895, certain classes of citizens, described as "laborers and dealers in live stock and agricultural products," thus arbitrarily selected, are *expressly exempted from punishment for precisely the same offence.* If the farmers who raised the cotton seed referred to in the complaint had entered into a combination to fix the price, as plaintiffs in error are alleged to have done, they would have been exempt from prosecution, under the statutes and Penal Code.

Starting, then, with the proposition that the State Court, admitting the existence of all of the other acts constituting parts of this system of anti-trust legislation, all of which contain the objectionable exemption clause, and refusing to hold that the Act of 1899 has repealed any of these statutes, has not determined this broad question as to *the effect of the exemption clause upon this alleged common offence created by all the statutes* constituting parts of the system, we are brought to an immediate consideration of these statutes, and shall demonstrate that *they do create and punish the same offence*—that with which we are charged—and do exempt from punishment therefor the arbitrarily selected class referred to. If this can be demonstrated, then *the entire system of legislation* must fall within the condemnation

of this Court's decision in *Connolly vs. Union Sewer Pipe Company, 184 U. S., 540.*

This must be so, because we cannot assume that this Court will permit the evasion, by indirection, of constitutional prohibitions. Without repealing its former statutes, the State of Texas has passed a statute (the Act of 1899) creating the *same offence*, in substantially the same words, found in the earlier statutes, which are admitted by the Courts to be unrepealed, without, *in terms*, including the clause exempting these arbitrarily described classes from punishment for the offence. The Legislature is thus in a position, when criticised by its labor and agricultural constituents, to hold out, with the one hand, the exemption clause of the earlier statutes, and, when called to account by its other constituents and by the Courts for this alleged violation of constitutional rights, to point, with its other hand, to the Act of 1899 and this decision in the *Laredo Ice case*, and to declare that there is no exemption in *that* statute.

Certainly, this Court cannot sanction such a position. Class legislation cannot escape condemnation on account of its *form*. If the Legislature passes one statute punishing all persons for certain acts, and then passes another exempting certain persons or classes from the operation of that statute, the legislation is none the less void because it is expressed in two statutes instead of one. Neither can the result be accomplished by passing a general act prohibiting without exception certain acts by all persons and leaving upon the statute books, unrepealed and unmodified, another statute which ex-

pressly permits certain classes of persons to do such acts. The guaranties of the Federal Constitution would be of little value, indeed, if they could be circumvented by such subterfuges.

There being no decision of the highest Court of Texas on the broad question involving the general scope of the exemption, admitted to exist, *in its effect on the system of laws* as a whole creating this *same offence*, this Court must necessarily examine and construe this system of laws for itself, and determine whether this exemption is the same arbitrary exemption (actually or in effect) heretofore condemned by this Court.

Turning now to the statutes themselves, and the particular facts in the case at bar, we find that the Act of 1889 and the Act of 1895, with some earlier provisions, have been incorporated in Articles 5313, *et seq.*, of the Revised Statutes, and Articles 976, *et seq.*, of the Penal Code.

In describing the *offence*, these acts make illegal combinations or agreements (1) to create or carry out restrictions in trade, commerce, or business; (2) to increase or reduce prices; (3) to prevent competition in manufacturing, transportation, sales or purchases, or in aids to commerce; (4) to fix standards of, or make agreements which shall fix, control, establish, or affect, prices.

The Act of 1899 differs in no substantial particular from these earlier laws, in the creation of the offence, although its form and phraseology are in some respects different. The offence is described in Section 1, which, like the earlier acts, prohibits combinations or agreements (1) to regulate or fix the price of any article; (2)

to maintain said price, when so regulated or fixed; (3) to fix or limit the amount or quantity of any article of manufacture.

There is no doubt whatever that these statutes all punish identically the same offences. Regulations of price are of course the same as agreements to increase or reduce, control or affect, prices. Agreements to maintain prices are the same as agreements to fix standards whereby prices shall be controlled, established or affected. Limitations upon the amount or quantity of an article manufactured are comprehended in agreements to fix or maintain standards of prices by which the price of an article may be in some manner "affected," and also restrict trade, commerce or business and prevent competition. In fact, there is no offence defined in the Act of 1899 which is not, on the face of the statute, clearly an offence under the earlier laws to which we have referred.

In any event, as we shall show, the offence with which this plaintiff in error is charged is the regulation and fixing of prices, and that is an offence created by each and all of these laws.

For these offences, a punishment is prescribed by the Revised Statutes and the Penal Code and by the Act of 1899. By Article 5320 of the Revised Statutes and by Article 987 of the Penal Code, the provisions of these laws are to be held "*cumulative of each other and of all other laws* in any way affecting them now in force in this state."

By Section 14 of the Act of 1899, as we have seen, it is declared that:

> "The provisions of the foregoing section and the pains and penalties provided for any violations of this Act, shall be held and construed to be *cumulative to all laws now in force in this state.*"

The Act of 1899 contains no repealing clause whatever.

In the case at bar, the plaintiff in error is charged with the offence of entering into a combination with two other corporations named, and with various other persons, firms and corporations, and of becoming a party to a pool, trust agreement, confederation and understanding, whereby they all together did:

> "*agree to regulate and fix and did regulate and fix the price* at which they would buy cotton seed, that they especially regulated and fixed the price of cotton seed throughout the State of Texas at Fourteen Dollars per ton and agreed amongst and with each other that they would not give more than said Fourteen Dollars per ton for cotton seed in any of the towns and communities of the State of Texas" (Record, p. 2).

It is then charged (Record, p. 3) that, by entering into such combination and understanding, and

> "by maintaining the *agreement to regulate and fix the price* of cotton seed aforesaid, the defendant was guilty of a *violation of the laws of the State of Texas.*"

The acts thus complained of were clearly offences under Articles 976 and 988*a* of the Penal Code of the State of Texas, and under Article 5313 of the Revised Statutes, which prohibit any combination to

> "fix at any standard or figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state,"

or by which the price shall

> "in any manner be affected."

The Act of 1899 makes unlawful a combination or agreement to "regulate and fix" such prices.

Article 5320 of the Revised Statutes provides that:

> "this chapter shall not be held to apply to live-stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages."

Article 988 of the Penal Code declares that:

> "The provisions of this law shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

It thus appears that the plaintiff in error is charged with the commission of *an offence* under "*the laws*" of the State of Texas; that *this offence*, as an attempt to regulate and fix prices, is plainly defined under all of the laws of Texas, including the Statute of 1899, on this subject, all of which are declared to be parts of a system and "cumulative" of one another, and that *for this very offence* laborers and dealers in live stock and agricultural products in the hands of the producer are expressly exempted from punishment.

The State of Texas, apparently seeks, in respect to *this offence* created by this *system* of laws, and common to all of the statutes on this subject, to masquerade behind the verbiage of a single one of those statutes, and insist that, because that act alone fails to *incorporate* the objectionable exemption clause, *the offence* itself is legally punishable, and there is no violation of constitutional rights.

There are in the Act of 1895, and in the Revised Statutes and the Penal Code of that year, clauses that permit agriculturalists, stock raisers and laborers to combine for this very regulation and fixing of prices for which this plaintiff in error has been condemned. Whether this plaintiff in error is being punished under the Act of 1899, or the Act of 1895, or the Act of 1889, or the provisions of the Revised Statutes or of the Penal Code revising the earlier acts, we do not know, and it is quite immaterial to inquire. Indeed, it must be assumed that the offence is charged, and the punishment is inflicted, for the violation of each of the anti-trust statutes of the State, treating them as a system of laws, for, in this case, unlike the Laredo Ice case, as we have seen, the violation of no special statute is charged. The offence of the plaintiff in error, if offence it be, was committed under *all* these laws, *which expressly permit agriculturalists and laborers to do the very acts here complained of.*

Those provisions were all enacted by the Legislature of Texas. They stand upon the books as laws of the State. The Courts are, of course, without any power to repeal them. The Supreme Court of Texas, in *the*

Laredo Ice case, deliberately refused to acquiesce in the contention of the Attorney-General that the Act of 1899 had worked a repeal of the earlier statutes. No valid law, it is clear, can be enacted by the Legislature of Texas, prohibiting such combinations, until these discriminating provisions, carried into the Revised Statutes and the Penal Code, shall be repealed, for they stand as an existing exemption of a given class from punishment for *the very offence* created by all laws on the common subject. The Legislature which created the exemptions is obviously the only power which can take away or repeal them.

Let us suppose that farmers, cattle raisers and laborers should be indicted, or sued for penalties, for doing the very acts complained of in the case at bar, and for which the plaintiff in error is punished, as in "violation of *the laws* of the State of Texas," is it not clear that the Courts would be bound to hold that the defendants in such a case had a good defense under the provisions of the Revised Statutes and the Penal Code exempting them from liability for just such acts? Certainly the State could not, merely by pointing to the Act of 1899, defining the same offence without in terms incorporating therein the exemption clause, sustain such an indictment or suit, for the defendants would at once point to the general exemption clause in the Penal Code and Revised Statutes *expressly permitting them to do the very acts complained of.* In other words, the acts condemned by the statute of 1899 *are permitted*, in respect to such favored classes, *by the existing provisions of law.*

But let us, even with repetition, look more closely into this system of laws of the State of Texas and the general course and history of the anti-trust legislation of that State.

One of the first principles in the system of laws adopted in the State of Texas, as we have heretofore pointed out, is, that no one shall be punished for any offence that is not plainly denounced by written law (Article 3 of the Penal Code, hereinbefore quoted).

There is no written law of the State of Texas making the acts complained of, *in respect to agriculturalists and laborers*, an offence, and of course such acts cannot be an offence when committed by those classes while the Revised Statutes and the Penal Code expressly provide that they shall not constitute such an offence.

Here we have several statutes constituting a system of laws on the subject of trusts. An agriculturalist, stock raiser or laborer could not be indicted or sued under the Statute of 1899 for any act which would not also be an offence within the Act of 1895 and the Revised Statutes and the Penal Code, and these latter statutes expressly declare that these favored classes shall not be punished for any such acts.

How, then, can it be possible for the State to proceed against members of these classes without being confronted with a well-founded demurrer based upon the proposition that the acts complained of are permitted by "*the laws*" of the State of Texas?

Nor, as we have intimated, in another connection, is it possible to spell out any intention on the part of the Legislature to repeal the earlier statutes by the Act

of 1899, which simply became a part of the system of statutes on the common subject of trusts and combinations. In arriving at the legislative intent, we of course may consider the entire body of the law of the common subject, even though any part of it be admittedly unconstitutional.

The Act of May 25, 1899 (anti-trust Act of 1899) in Article 14, as we have seen, is expressly made "cumulative" of all other laws, and there is no repealing clause in that Act or in any other later act on this sebject, prior to 1903. Not only so, but, in the Act of June 5, 1899, as we have also seen (General Laws 1899, p. 310) by amending Article 5318 of the Revised Statutes, which is a literal reproduction of Section 10 of the Act of 1895, which in turn is a precise copy of the same section in the Act of 1889, the Legislature expressly recognized and affirmed the continued existence of the provisions of the Statute of 1895 and of the provisions of the Revised Statutes revising the same.

Article 5318 of the Revised Statutes fixes the minimum penalty for the offence created by these various statutes at Fifty Dollars per day. This Act of June 5, 1899, amends that provision so as to make the penalty not less than Two Hundred Dollars nor more than Five Thousand Dollars for each offence, making each day's violation of the statute a separate offence.

In Section 3 of this amendatory Act of June 5, 1899, in giving the reasons for the emergency requiring that the act should take effect immediately, the Legislature declares the importance of making the

penalties of "existing trust laws correspond." This act, it will be noted, was passed ten days after the anti-trust Act of May 25, 1899, and, notwithstanding the passage of that law, clearly recognized the continued existence of all of the entire body of "existing trust laws." This, coupled with the "cumulative" provision in Section 14 of the anti-trust Act of 1899, would seem to be conclusive evidence that that act was merely enacted as a part of the system of anti-trust statutes.

And, finally, in the case of *State of Texas vs. The Laredo Ice Co.*, 96 Texas, 461, the Court refused to acquiesce in the Attorney-General's contention that the earlier acts had been repealed by the statute of 1899, and expressly assumed the existence of all those statutes as parts of a common system.

We thus *find conclusive evidence that the Legislature intended that the exemption of agriculturalists, stock raisers and laborers should remain unimpaired by the anti-trust Act of 1899.*

If the Legislature had intended to repeal such provisions, it is clear that it would not have failed to express such intention by an express repealing clause in the anti-trust Act of 1899, and it is also clear that it would never have passed the latter Act of June 5, 1899, amending the existing provisions of the Revised Statutes for the purpose of making "existing trust laws correspond." It cannot be supposed that the Legislature intended to repeal Article 5320 of the Revised Statutes by the Trust Act of May 25, 1899, when, in almost the same breath, it amended Article 5318 and part of the Penal Code on the subject, without even

amending Article 5320 and without a word even to suggest that it should not continue in full force. Looking at the two acts, the general anti-trust Act of May 25, 1899, and the amendatory Act of June 5, 1899, recognizing all "existing trust laws" and amending an important provision of earlier laws, there seems to be no room for doubt that the Legislature intended to leave intact and in full force and effect every provision of the previous acts except Article 5318 as to penalties, which it proceeded expressly to amend.

It is useless to argue, as did Mr. Chief Justice FISHER, of the Texas Court of Civil Appeals, in *State vs. Shippers Compress, and Warehouse Company*, when that case was in that court on a motion for rehearing (67 Southwestern Reporter, p. 1049), that, inasmuch as the Acts of 1899 and 1895 were void by reason of the exemption clause, they simply did not exist, and were therefore not laws to which the Act of 1899 could be "cumulative." It might be argued with quite as much reason that, because the exemption clauses were void, they did not exist, and consequently the Acts of 1899 and 1895 were valid, notwithstanding such exemptions; whereas, it is settled that those clauses may and do invalidate the whole statute. In any event, unconstitutional laws are *facts*, and are always to be considered in arriving at the legislative intent.

In *Waters-Pierce Oil Co. vs. State*, 19 T. C. A., 1, in an elaborate opinion filed March 9, 1898, these statutes had been adjudged valid and free from the constitutional objection based upon the discriminating provisions; and the State Supreme Court denied a writ of error in that

case. Moreover, the State Supreme Court had previously —April 8, 1895—expressly affirmed the constitutionality of the statutes in *Houck vs. Anheuser, etc.*, 88 Texas, 184, and every Court of Civil Appeals in the State, and every District Court before which the question had come, had held the Acts of 1889 and 1895 constitutional, before the Act of 1899 was passed.

Therefore, it seems certain, the Legislature regarded the Acts of 1889 and 1895 as valid, and believed that the exemption provisions contained therein and in the codes were entirely consistent with the State and Federal Constitutions. To what, then, did the Legislature refer when, in Section 14, it declared that the Act of 1899 should "be held and construed to be *cumulative* to all laws now in force in this State?" To what did it refer, if not to the acts previously passed and to the provisions of the codes based thereon, which the Court had repeatedly adjudged to be constitutional, and to which the Legislature, ten days afterwards, referred as "*existing trust laws?*"

Section 14 must be given effect. It is quite true that the previous acts are not valid laws, but that does not meet the question, which is, what did the Legislature intend? It is plain that it *regarded them as laws*, and intended that the Act of 1899 should be "cumulative" of and supplemental to them.

The Court cannot assume that the Legislature would have passed the Act of 1899 without exempting agriculturalists, stock raisers and laborers from its provisions, had not such exemptions already existed under previous laws. Two previous Legislatures, by the Acts of 1889

and 1895, had declared that such classes should not be liable for forming the combinations prohibited as to others, and the State Courts had sustained the exemption. The Legislature of 1895 broadened, instead of restricted, the exemptions created by the Act of 1889, by including laborers with agriculturalists and stock raisers. The Legislature of 1899 did nothing to indicate any change of policy with respect to this matter. It not only failed to repeal the exemption clauses in prior laws, but declared that the act passed by it should be "cumulative" of all such laws.

It being the manifest intention, then, of the Legislature, in passing the Act of 1899, merely to supplement the previous acts and make it a part of the system of anti-trust legislation of the State, and leave undisturbed the exemption clauses of the prior acts, it follows that they are *in pari materia*.

The Acts of 1889, 1895 and 1899, all had the same object in view, and were designed to accomplish the same purpose—the suppression of trusts. This is, of course, obvious from the titles, as well as from the substance of the acts. The first was held by the Supreme Court of Texas in *Queen Insurance Co. vs. State, 86 Texas, 250*, not to prohibit combinations between insurance companies, and in the same case (22 S. W. Rep., 1048) the Court of Civil Appeals held that the act was defective because it did not *prohibit* the combinations defined. To meet those objections, the scope of the act was extended by the Act of 1895, so as to include insurance companies as "aids to commerce," and to expressly prohibit, as was done in Section 6, the combinations

defined in the first section; and to extend the exemptions previously made in favor of agriculturalists and stock raisers, to labor organizations. But few proceedings had been commenced under those laws, and the Legislature in 1899 concluded that such combinations were in existence and were gaining strength, whereupon the act of that year was passed, whereby the terms to guard against evasion were *broadened* and the definitions made more specific; and provisions were made, which it was believed would force a disclosure of the existing combinations by means of the affidavit which the act required of all corporations doing business in the State. The latter is the most conspicuous feature of the act. The evident purpose was to *make the previous laws more effective* and to supplement their provisions.

This Act of 1899 is probably the only act that was ever passed, in Texas, upon a subject dealt with by previous laws, that contained no repealing clause. On the contrary, the first sentence of Section 14 contains the "cumulative" provision to which we have referred. The only reference to any repeal is in the second sentence of the same section, which reads as follows:

> "And provided that the provisions of this act shall not exempt from punishment or forfeiture any person, firm, association of persons or corporation who may have violated or offended against any laws now in existence that may be, or may be construed to be, repealed by this Act or in conflict herewith."

Taking all the statutes together, it is entirely clear that the Act of 1899 is a mere addition to the previous

acts and a part of them. The acts being clearly *in pari materia*, they must of course be read together and treated as parts of one system. This is well settled. In Dwarris on Statutes (Potter's Ed.), page 189, it is said:

> "It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is, therefore, an established rule of law that acts *in pari materia* are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes because they are considered as framed upon one system and having one object in view."

See, also,

Alexander vs. Mayor, 5 Cranch, 1.
Patterson vs. Winn, 11 Wheat., 380, 385.
Ryan vs. Carter, 93 U. S., 78, 84.
Pearce vs. Atwood, 13 Mass., 324, 344.
Reg. vs. Tonbridge Overseers, L. R., 13, Q. B. Div., 339, 342.
Sutherland Statutory Construction, § 288.

The rule was recognized in Texas from the very first, and has been applied many times by the Supreme Court of that State (*Cain vs. State, 20 Tex., 355, 362; Shelby vs. Johnson, Dallam, 597; Bryan vs. Sundberg, 5 Texas, 418; Selman vs. Wolfe, 27 Texas, 68, 70; Hanrick vs. Hanrick, 54 Texas, 101, 103*).

The Act of 1899 is, therefore, merely *in pari materia* with all pre-existing laws on the same subject, and a part of the general system of laws enacted by the Legislature of the State of Texas, making it an offence to do

any Act tending to create a trust or monopoly within any of the definitions of these statutes. From prosecution for *the offence punished by all* these laws, agriculturists, stock raisers and laborers are now, and have always been, *exempt*. The plaintiff in error is charged with the commission of *this very offence* created by "the laws" of that State. It is clear that it cannot be constitutionally punished therefor, while there exists this discrimination in favor of these selected classes, for such discrimination is in contravention of the rights guaranteed by the Fourteenth Amendment.

Accordingly, "the laws" of the State of Texas creating *this offence*, constituting the entire body or system of laws of that State regulating trusts and monopolies, must be condemned as unconstitutional and void.

We have been proceeding upon the assumption (in accord with the fact) that the State Courts of Texas have *never held* that there was *not* upon the Statute Books of that State any law *exempting* any favored class of persons from punishment for the *offence* with which the plaintiff in error is charged. We have clearly shown, we think, that both the Supreme Court of that State, in the *Laredo Ice Company case*, and the Legislature, have assumed and affirmed the continued existence of the provisions of the Revised Statutes and the Penal Code on this subject and the consequent harmonious existence with those provisions of the Statute of 1899, or a part of the same system of laws.

In this connection it is to be observed that in the anti-trust Act of 1903 the Legislature substantially re-enacts all of the provisions of both the Acts of 1895

and 1899, including also the provisions of the Revised Statutes and the Penal Code, and expressly repeals all of the pre-existing laws, including provisions of the Revised Statutes, the Penal Code and the Acts of 1895 and 1899, thereby demonstrating that the Legislature considered all of those laws to be still in force and to constitute the system of laws on this subject, *all* of which it proceeded to *re-enact* in this single comprehensive Statute passed last year.

Even upon the extreme assumption that, *while admitting the existence of the exemption clause* in pre-existing laws, still unrepealed, the State Court held that the Act of 1899 must be regarded as an independent enactment, all-sufficient in itself to justify the punishment for the offence in question, it would still be for this Court to determine for itself whether the existence of the exemption clause in the Revised Statutes and Penal Code of the State amounted to an arbitrary discrimination in favor of one class of citizens, exempting them from punishment for *the very offence* created by the Act of 1899.

It has always been the law in this Court, that, where the question is merely one

> "of the construction of a State Statute, which does *not nccessarily involve* a federal question"

the determination of the State Court is conclusive upon this Court.

Osborne vs. Florida, 164 U. S., 650, 656.

But it is equally well settled that this Court is not bound by State Court decisions construing State Statutes,

or otherwise, where a federal question is involved, as, for instance:

1. Where federal citizenship is claimed.

Boyd vs. Nebraska, 143 U. S., 135.

2. Where the question involved relates to the rights of a federal corporation, or a national highway or post-road.

Roberts vs. Northern Pacific R. R., 158 U. S., 1.

3. Where a State Statute is alleged to create a contract, the obligation of which, it is claimed, has been impaired.

In *Ohio Insurance & Trust Co. vs. Debolt*, 16 How., 416 (1853), in referring to a contract alleged to be created by State Statutes, this Court said (p. 432):

> "It is said that they are laws of the State, and that this Court always follows the construction given by the State courts to their own constitution and laws.
>
> "But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be made in the form of a law. For it would be *impossible for this court to exercise any appellate power* in a case of this kind, *unless it was at liberty to interpret for itself* the instrument relied on as the contract between the parties. *It must necessarily decide whether the words used are words of contract, and what is their true meaning* before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment

upon this subject, *it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the legislature*, or of a covenant or agreement by one of its agents acting under the authority of the State."

See also:

Bridge Proprietors vs. Hoboken Co., 1 Wall., 116, 145 (1863);
Wright vs. Nagle, 101 U. S., 791 (1879);
Douglas vs. Kentucky, 168 U. S., 488, 501 (1897);
Bacon vs. Texas, 163 U. S., 207 (1896);
Louisville Gas Co. vs. Citizens' Gas Co., 115 U. S., 683 (1885);
McGahey vs. Virginia, 135 U. S., 662 (1890);
Mobile & Ohio R. R. vs. Tennessee, 153 U. S., 486 (1894);
Chicago, etc., R. R. vs. Nebraska, 170 U. S., 57 (1898);
McCullough vs. Virginia, 172 U. S., 102 (1898);
Vicksburg, etc., R. R. Co. vs. Dennis, 116 U. S., 665 (1886);
Bryan vs. Board of Education, 151 U. S., 639 (1894);
L. & N. R. R. vs. Palmes, 109 U. S., 244 (1883).

So we say here, it is for this Court to decide for itself whether the words of the exemption clause are words creating an arbitrary classification before it can determine whether equal protection of the laws has been denied.

4. Similarly, when it is claimed that the State Statute and its procedure are not due process of law.

In *Scott v. McNeal*, 154 U. S., 34, at p. 45, the State Court had held that all parties in interest must be deemed to have had due notice of the proceedings by which administration had been granted upon the estate of a living person, and pursuant to which his property had been sold, and that, therefore, the proceedings must be deemed to have concluded such person, though living. This Court, in rejecting the State Court's construction of its statutes and proceedings, as plainly involving a violation of the constitutional provision prohibiting the deprivation of property without due process of law, said:

> "After giving to the opinion of the Supreme Court of the State the respectful consideration to which it is entitled, *we are unable to concur in its conclusion, or in the reasons on which it is founded.*
>
> "The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains: 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities. Virginia v. Rives, 100 U. S., 313, 318, 319; *Ex parte* Virginia, 100 U. S., 339, 346; Neal v. Delaware, 103 U. S., 370, 397. And the first one, as said by Chief Justice WAITE in United States v. Cruikshank, 92 U. S., 542, 554, repeating the words of Mr. Justice JOHNSON in Bank of Columbia v. Okely,

4 Wheat., 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice.'

"*Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by that Court's construction of a statute of the Territory, or of the State, when the question is whether the statute, provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired* by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given *due faith and credit* in the courts of another State. *In every such such case this Court must decide for itself the true construction of the statute.* Huntington v. Attrill, 146 U. S., 657, 683, 684; Mobile & Ohio Railroad v. Tennessee, 153 U. S., 486, 492-495.

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

It will be observed that the question there considered, as to whether the statute and the proceedings of a state court amounted to a deprivation of property without due process of law, is substantially identical with the Federal question here presented, as to whether the exemption clause in the State Statute, of which complaint is here made, amounts to an arbitary classification, and a consequent denial of the equal protection of the laws. The two cases are alike, the one arising under

the first clause of the Fourteenth Amendment, with reference to the deprivation of property, and the case at bar arising under the second clause, with reference to the denial of the equal protection of the laws. There is no possible distinction to be drawn between the two cases, and they both require the independent judgment of this Court, as to the construction and effect of the State Statute.

5. Where it is alleged that full faith and credit has not been given to the judgment of a sister State, and it is necessary to determine the nature of the original cause of action, and in so doing, to construe a State Statute.

In *Huntington vs. Attrill*, 146 U. S., 657, at p. 683, this Court said:

> "If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit, to the judgment, *must determine for itself whether the original cause of action is penal* in the international sense. *The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts*, in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this Court has power, in order to determine whether any contract has been impaired, to

decide for itself what the true construction of the contract is. New Orleans Waterworks v. Louisiana Sugar Co., 125 U. S., 18, 38. So, if the State court, in an action to enforce the original liability under the law of another state, passes upon the nature of that liability and nothing else, this court cannot review its decision; but, *if the state court declines to give full faith and credit* to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, *this court, in determining whether full faith and credit have been given in that judgment, must decide for itself the nature of the original liability.*"

6. And, generally, wherever a right is set up, under the Constitution, which, it is alleged, is violated by a State Statute, and where this Court differs from the State Court as to the meaning and effect of the statute, or it is evident that the State Court decision will impair the "efficacy" of some provision of the Constitution.

In *Yick Wo vs. Hopkins* (118 U. S., 356), it appeared that the laws of the State of California authorized the enactment of certain ordinances by the Board of Supervisors of the County of San Francisco to prohibit or regulate all occupations contrary to public order and decency, or dangerous to the public safety. Pursuant to the power thus conferred, the Supervisors passed ordinances regulating laundries, which were alleged to be aimed at, and to discriminate against, the Chinese as a class. The constitutional right under the Fourteenth Amendment being set up, this Court determined for itself whether on their face, as well as in their practical appli-

cation by the Supervisors, these ordinances authorized an arbitrary classification. The Court, while admitting that its jurisdiction was limited to the question whether the plaintiff in error had been denied a right in violation of the Constitution, laws or treaties of the United States, and while admitting that in one of the cases, which was an appeal from the Circuit Court of the United States for the District of California, the question as to the illegality of the petitioner's imprisonment, under the laws of the State, might have been independently considered, but that nevertheless judicial propriety was best consulted by accepting the judgment of the State Court on that point, insisted (p. 366) :

> " That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco *an independent construction ; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain, and adjudge.*
>
> " *We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question.* That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. *We are not able to concur in that*

interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

In *Atchison, Topeka & Santa Fe R. R. Co. v. Matthews*, 174 U. S., 96, at p. 100, this Court, in upholding the constitutionality, under the Fourteenth Amendment of a Kansas Statute relating to the liability of railroads for damages by fire, the statute also providing for the recovery of an attorney's fee, and the terms of the statute being substantially like those of a statute of the State of Texas, which had been condemned in *Gulf, etc., Ry. Co. v. Ellis*, 165 U. S.,

150, said that the decision was not subject to the criticism that the statute of the one State was upheld merely because the State Court had declared the provisions of the act to be a matter of police regulation, while that of the other State was condemned because its Supreme Court had placed the purpose and scope of its act entirely outside of the domain of police regulation, since:

> "*This Court is not concluded by the opinion of the Supreme Court of the State.* Yick Wo vs. Hopkins, 118 U. S., 356–366. *It forms its own independent judgment as to the scope and purpose of a statute*, while of course leaning to any interpretation which had been placed upon it by the highest court of the state. We have referred to the interpretation placed upon the respective statutes of Texas and Kansas by their highest courts, not as conclusive, but as an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment."

In other words, the Federal questions which arise under the Fourteenth Amendment necessarily involve the exercise by this Court, in each case, of its independent judgment as to the purpose, scope and effect of what the highest Court of a State has declared to be the existing statutory law of the State. Although the State Court itself may have expressed its own judgment as to the purpose and effect of the statute, that judgment can receive here only respectful consideration, with, perhaps, a leaning in its favor.

In *Norton v. Shelby County*, 118 U. S., 425, 439, the Court said:

> "Upon the construction of the constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, *unless they conflict with or impair the efficacy of some principle of the Federal Constitution*, or of a Federal statute, or a rule of commercial or general law. In these cases no principle of the Federal Constitution, or of any Federal law, is invaded, and no rule of general or commercial law is disregarded."

So, in *Gormley v. Clark*, 134 U. S., 338, 348, the Court said:

> "Upon the construction of the constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, *unless they conflict with or impair the efficacy of some provision of the Federal Constitution*, or of a Federal statute, or a rule of general commercial law."

To precisely the same effect, see

Stutsman County v. Wallace, 142 U. S., 293, 306;

Osborne v. Missouri Pacific Ry., 147 U. S., 248, 258.

In view of the foregoing exceptions, the occasional statement that, in considering questions of this nature, decisions involving the impairment of the obligation of contracts are made by this Court the *sole* exception to the rule as to the conclusiveness of State Court decisions, must be deemed to be inadequate and obsolete. The suggestion originated with *Jefferson Bank vs. Skelly*, 1 Black, 436, before the Fourteenth Amendment was adopted. One provision of the Constitution is as sacred as another.

The case at bar obviously comes within the principle of the exceptions thus enumerated. Plainly, this Court cannot possibly accept as conclusive the decision of the State Court as to the scope, meaning and effect of this admitted exemption clause, effecting, when construed with the other statutes of the State, *in pari materia*, what is claimed to be an arbitrary classification of persons, in respect to the offence in question, in violation of the rights guaranteed by the Fourteenth Amendment. That, like the questions of due process of law, full faith and credit to which State judgments are entitled, and of the impairment of contract obligations is, essentially and necessarily, a question for the final and independent determination of this Court.

It is for this Court, then, we submit, even proceeding upon this assumption we have made, for the sake of the argument, as to the holding of the State Court, to determine for itself, first, whether *the offence* of this plaintiff in error under the Act of 1899 is *the same offence* created by, and punishable under, the Revised Statutes and the Penal Code, and therefore whether the exemption clause found in these latter statutes amounts to an unconstitutional classification and discrimination among persons within the jurisdiction of the State. It is for this Court to determine every question entering as an element into the consideration of the nature, scope and validity of such discriminatory and classifying provisions, because this Court is bound to determine for itself the Federal question. Finding the admitted exemption, then, this Court will consider for itself the meaning and scope of that exemption, in respect to the persons

punishable for *the offence* with which the plaintiff in error is charged. The question is precisely the same as those considered in the cases hereinbefore cited in the enumeration of the settled exceptions to the alleged conclusiveness of State Court decisions.

In passing on the constitutional right, this Court must determine the nature, scope and effect of the provisions of law alleged to violate that right. So much, at least, is involved in the Federal question. In other words, in cases arising under the contract clause and the Fourteenth Amendment, the State Court may finally determine the existence of the statute or regulation making, or empowering the making of the contract, or the invidious classification, complained of, and may then, as in the case at bar, enter upon the domain of this Court and decide *against* the constitutional protection set up by the plaintiff, by declaring that the statute, admitted to exist, does not create a contract in the one case or any unreasonable or improper classification in the other. The statute and statutory power, however, being admitted, it is for this Court to say, finally, whether it does create a contract protected from impairment by the Constitution, in the one case, or an improper and unreasonable classification, condemned by the Constitution, in the other.

We submit, then, that it is for this Court to say, in view of the admitted harmonious existence of all of the statutes on the subject creating this offence, that the obvious purpose and effect, upon the obnoxious exemption clause, of this "cumulative" provision in the Act of 1899, is (as this Court may say, in agreement with

the Supreme Court of Texas), perhaps, not to make this objectionable clause a technical and physical part of the Law of 1890, on the ground that it has been physically incorporated, by reference, *but rather to make the Act of 1899, what that Court has expressly held it to be, an integral and harmonious part of the body of laws creating the offence* with which the plaintiff in error has been charged, so that the exemption clause becomes operative upon the common offence created by all of these laws.

This leads us to say that, after all, we are asking this Court not to controvert, but rather lo lean towards, and follow, the State Court on this subject. Certainly, it is a striking admission by that Court, to hold, as it does (96 Texas, at p. 466) that the term "cumulative" in the Act of 1899, "*indicates an harmonious co-existence and co-operation*" of the Act of 1899 with the other acts on the same subject. The holding that it does not effect a physical "consolidation" of the two, making "one law" of them (for that is all the State Court really holds, in this respect) is immaterial, in view of the obvious fact that all of these statutes create precisely the *same offence.*

This Court finds that the State Court has declared that the exemption clause and, in effect, therefore, all the other anti-trust acts, are not a physical part of the Act of 1899; and, on the other hand, has insisted that *the Act of 1899 itself is a harmonious, co-existent and co-operating part of all these other acts,* and of the whole system of laws on this subject. This Court is, therefore, left to determine for itself the force

and effect of the "harmonious" and "co-existing" laws, in the midst of which it finds this exemption clause, and must accordingly form its own judgment as to the effect of this latter clause upon this entire body of "harmonious" laws.

There can be no such thing as "harmonious co-existence and co-operation," on the part of the Act of 1899, without the complete and substantial absorption of that act in the system of laws created by the Revised Statutes and the Penal Code, embodying the Law of 1895, and the consequent full and complete operation, on the co-existent and co-operating statute, of this condemned exemption clause. Clearly, there can be no "*co*-existence and *co*-operation"—much less, "*harmonious* co-existence and co-operation"—unless such harmony is promoted and maintained by giving full effect to this *co*-existing exemption in the Penal Code. The Act of 1899, in short, is declared to *co*-exist and *co*-operate *with* this exemption. That cannot be unless the exemption operates upon and with the Act of 1899, and the Act of 1899 operates upon and with the exemption. That is self-evident.

"*Co-*" means "together," "with." To *co-operate*, is "to act or operate *jointly with another or others to the common end*"—"*to unite in producing the same effect.*" To co-exist, is "to exist *at the same time with another.*"

Century Dictionary.

Thus, accepting the very terms of the decision of the State Court, this Court, determining for itself the scope of the "*cumulative*" provision, *as construed by the State*

Court, in its effect upon the Federal question involved in the determination of the scope and effect to be given to the *exemption* clause, must hold that full effect can be given to that exemption only by maintaining its "harmonious *co*-existence and *co*-operation" with the Act of 1899, upon which the State Court insists.

Third Point.

SINCE THE ANTI-TRUST STATUTES ARE IN CONTRAVENTION OF THE FEDERAL CONSTITUTION THEY ARE ABSOLUTELY VOID; AND ARE INEFFECTUAL FOR ANY PURPOSE AGAINST CORPORATIONS AS WELL AS INDIVIDUALS.

> "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto*, is true also as to any part of an act which is found to be unconstitutional and which consequently is to be regarded as having never at any time been possessed of any legal force."
>
> *Cooley's Constitutional Limitations (5th Ed.), p. 224.*

Such is the common and universal conception of an unconstitutional statute. The statute exists as a fact —as an act of the legislature, but an unconstitutional

act, and therefore without any force or effect as law. Of course a statute may embrace constitutional and unconstitutional provisions; and where the constitutional and unconstitutional provisions may be separated, and are in no wise dependent upon each other, and where there is no reason to doubt that the legislature would have passed the act without the unconstitutional provisions, then the constitutional parts may be sustained. (*Reagan vs. Trust Co., 154 U. S., 362; Western Union Telegraph Co. vs. State, 62 Texas, 630*). But this not is such a case. Here the invalidity obviously extends to the entire legislation, and therefore the whole must fall. (*Connolly vs. Union Sewer Pipe Co., 184 U. S., 540.*) And being *in toto* void, no right of action can be founded upon the legislation by the State which enacted it any more than by an individual or corporation. It is simply without any force as law in behalf of any one, or at any time, or under any circumstances.

The decision of the Supreme Court of Texas in *State vs. Shippers Compress & Warehouse Co., 95 Texas, 603*, is the authority for the decision in this case; and the Court of Civil Appeals assumed that the decision in that case was supported by the decision of this court in *Waters-Pierce Oil Co. vs. Texas, 177 U. S., 28.* It will be observed, however, that the Supreme Court of Texas did not base its decision in *State vs. Shippers Compress & Warehouse Co.* upon the proposition that the anti-trust laws entered into and became a part of the charter of the defendant corporation, which was the turning point of the decision in *Waters-Pierce Oil Co. vs. Texas,* but proceeded upon the distinct

ground that the law was valid as to corporations, although, under the decision of this court in *Connolly vs. Union Sewer Pipe Co.*, it was invalid as to individuals. We quote from the opinion of the court as follows (State vs. Shippers Compress & Warehouse Co., 95 Texas, 603, 611):

> "The State seeks to forfeit the charter of the defendant corporation because the incorporators combined 'to restrict aids to commerce,' and procured the charter with intent to carry out that purpose. The defendant insists that the law is unconstitutional, and therefore void in whole, and will not support the action to forfeit the charter. Upon the same objection we held the anti-trust law of 1889 to be constitutional, and there is no such difference between the two laws as would affect the decision of this question. We believe that our decision is correct,—that the law is not in contravention of the constitution of the state, nor of the United States. Houck v. Association, 88 Tex. 189. In the case of Connolly v. Pipe Co., 184 U. S. 540, the Supreme Court of the United States held that a statute of the state of Illinois in all essential particulars the same as the act of 1895 was in conflict with the fourteenth amendment to the constitution of the United States, because it excepted 'agricultural products and live stock while in the hands of the producer or raiser.' We recognize the superior authority of the Supreme Court of the United States upon this question, and in obedience to its decision we shall hold that, *in so far as the law of 1895 comes within the terms of the Connolly case*, it is invalid; it will not support an action by the state to

recover a penalty for a violation of the law, nor will it, in suits between corporations or individuals, support a defense based upon the fact that the right of action originated in a violation of the anti-trust law. *But to the extent that the statute of this state is not embraced in the decision of the supreme court of the United States, we shall adhere to our former decision that it is constitutional and valid, and therefore enforceable by the state.*

In the case of Waters-Pierce Oil Co. vs. Texas, 177 U. S., 28, the very question that is now before this court was decided by the supreme court of the United States. In that case the state sued to revoke the license of the Waters-Pierce Oil Company to do business in Texas, alleging as a reason therefor that it violated the anti-trust law of 1889. The judgment of the state court forfeited and revoked the license of the corporation to do business in Texas, and the case was taken to the supreme court of the United States upon a writ of error. The question was sharply presented upon the specific objection that the statute was void because of the very reasons upon which the court held the Illinois statute void in the Connolly case; but the supreme court of the United States held that under the law of 1889 the license to do business in Texas might be revoked, although the statute should be held void upon the grounds claimed by the corporation, which was conceded in the Connolly case. The judgment of the state court in the former case could not have been affirmed except by holding the statute to be constitutional, or, if void as to the enforcement of the penalty, it was valid in so far as it reserved the

right to the state to revoke the license because of the violation of the anti-trust law. There is no difference between that case and the present; we therefore hold that the law of 1895, tested by the decisions of the supreme court of the United States, *is valid to the extent that it authorizes the state to revoke the license of a foreign corporation or to forfeit the charter of a domestic corporation for acts done which are forbidden by the anti-trust law.*"

Thus it appears that the Supreme Court of Texas was unconvinced by the decision of this court in *Connolly vs. Union Sewer Pipe Co.* and is still of opinion that the anti-trust statutes of Texas are constitutional and valid notwithstanding the fact that they contain the identical discriminating provision which nullified the Illinois statute. That court still declares that (p. 611):

> "To the extent that the statute of this State is not embraced in the decision of the Supreme Court of the United States, we shall adhere to our former decision that it is constitutional and valid and therefore enforceable by the State."

It would not seem to be valid to any "extent" in view of the decision of this court that the Illinois statute was, by the unconstitutional provision, rendered invalid *in toto.* Upon that point this court said (184 U. S., 540, 565):

> "The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be en-

forced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms *all* persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

But the Supreme Court of Texas refused to follow this court in that ruling, and declared that the statutes are in some parts free from constitutional objection and valid; and proceeded to enforce the same against

Plaintiff in Error. It did not at all rest its decision upon the ground that the statute was a part of the charter contract, and that therefore the corporation could not raise the question, but based its ruling upon the proposition that it was right in its original opinion and this court wrong, and that the statute was constitutional and enforceable except in the particular circumstances presented to this court in the Illinois case. From necessity it had to "recognize the superior authority" of this court, but it yielded "obedience to its decision" most reluctantly and only nominally, for it disregarded it in principle by declaring the statute constitutional still to an "extent," and enforcing the same against corporations.

The point of the decision of the Supreme Court of Texas is that the statutes are valid as to corporations, though void as to individuals—not that they are part of a *charter contract*, but that they are binding as *laws*, because it holds and claims to find authority in the decision of this court in *Waters-Pierce Oil Co. vs. Texas* for holding that no corporation licensed or chartered by a state can challenge the constitutionality of a statute of that state!

Its opinion leaves no room to doubt that it considers that any law, or anything in the form of a law, however objectionable to the Constitution, may be enforced against a corporation created by the State or transacting business within the State. It apparently regards corporations as beyond the protection of the Federal Constitution, since the decision of this Court in *Waters-Pierce Oil Co. vs. Texas.* The Legislature undoubtedly

so understood the Court since the repealing clause of the new anti-trust act of March 31, 1903, provides that nothing in the act should be construed to affect or destroy the right of the State "to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this State for acts committed before this act takes effect."

Under the view of the Supreme Court of Texas, and under the Act of March 31, 1903, passed in the light of its decision the State of Texas in addition to the forfeiture of corporate rights may recover of corporations which have violated any of the provisions of the Acts of 1889, 1895, and 1899, the enormous fines prescribed by said Acts, although they are not only invalid as to individuals, but have been repealed expressly as to all persons except corporations.

We submit that there is nothing in the decisions of this court to warrant any such flagrant denial to corporations of the equal protection of the laws, or impairing its previous decisions settling apparently for all time the proposition that corporations are "persons" within the protection of the Fourteenth Amendment of the Federal Constitution.

Fourth Point.

THE DECISION OF THIS COURT IN WATERS-PIERCE OIL CO. VS. TEXAS DOES NOT SUPPORT THE DECISION OF THE TEXAS COURTS IN THIS CASE.

It seems clear that the Supreme Court of Texas has misunderstood the decision of this court in *Waters-*

Pierce Oil Co. vs. Texas (*177 U. S., 28*), or has for some reason extended the doctrine of that case much further than warranted by the nature of the case or by any other decision of this court. It is quite important to correctly understand the character of that case. It came to this court on a writ of error to the Court of Civil Appeals of the State of Texas under Section 709, U. S. R. S. The Court of Civil Appeals had found and decided that the anti-trust acts of 1899 and 1895 involved in that case entered into and were practically a part of the license granted to the Waters-Pierce Oil Co. Of course, this court, with certain exceptions, is bound by the construction of a State statute adopted by the courts of such State. Referring to the provision of the act of 1899 for the forfeiture of licenses granted foreign corporations, the Court of Civil Appeals said, *Waters-Pierce Oil Co. vs. State, 19 Tex. Civ. App., 1, 20.*

> "This provision of the law was as much a part of the obligation and as binding upon the appellant as if it had been expressly made a part of the permit."

This was a construction by the State court of what it claimed to be the statutes of the State authorizing the admission of foreign corporations and imposing conditions upon their transactions in the State. It was taken by this court as the basis for its decision in that case; and there seems nothing to indicate that its decision would have been the same in the absence of such finding by the State court.

If the provision of the Anti-Trust law were a part of the license granted to foreign corporations—if such

such statutes were, in legal contemplation, written into the license as conditions upon which it was granted—there was probably no occasion for inquiry into the constitutionality of the statute. The State court having thus interpreted the statutes, and found them to be a part of the contract between the State and the corporation, this court apparently found it unnecessary to consider such statutes in their aspects as *laws* but considered them merely as parts of a *contract* entered into between the State and the corporation. This court intimated no opinion respecting the validity of the statutes in question as laws, and it certainly did not hold that a corporation, any more than an individual, is bound by a statute attempted to be enforced as *law* which is in violation of the Constitution of the United States.

The real question involved in *Waters-Pierce Oil Co. vs. Texas* seems to have been one of *corporate power*—limitations imposed upon the power of the corporation—conditions of the contract between the State and the foreign corporation. Conditions written into the licenses of foreign and the charters of domestic corporations become parts of the charter contract. But general laws not desigted to define or limit corporate powers, but applying to individuals and persons generally—laws intended to direct or prohibit the *conduct* of persons and not to create corporations—laws that regulate, and apply to corporations only *incidentally* with other persons, and not *because* they are corporations, are no part of the contract between the State and the corporation, but are general rules of conduct to be tested just as other laws. We submit that looking to the question

actually involved and decided, there is nothing in *Waters-Pierce Oil Co. vs. Texas* inconsistent with this proposition. At any rate, this Court did not itself hold in that case that the anti-trust statutes were written into or were in any respect a part of the license or contract between the State and the corporation. That holding was by the Court of Civil Appeals only, and this Court did not undertake to review it.

We maintain that the Court of Civil Appeals erred in holding in *Waters-Pierce Oil Co. vs. Texas* that the anti-trust statutes entered into and were a part of the license granted the defendant in that case; and that such error was responsible for the decision of this Court in the same case. It affords ample, but the only ground upon which to reconcile the decision of this Court in that case with its decisions before and since in other cases.

That such was the ground of the decision of this court in that case is shown by its decision in the subsequent case of *New York Life Insurance Company vs. Cravens, 178 U. S., 389*, where in discussing *Waters-Pierce Oil Co. vs. Texas*, Mr. Justice McKENNA said (178 U. S., p. 397):

> "*And as the state court had held that the statute was a condition imposed upon the oil companies doing business within the state*, we said of the statute that, 'whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it.'"

Such ruling of the Court of Civil Appeals in that

case was vigorously assailed in the same court in the subsequent case of *State vs. Shippers Compress & Warehouse Co.*, 95 Tex., 603, and in the case at bar, and was not repeated, for the court was evidently convinced of its error. It is significant that Chief Justice FISHER who wrote the opinion of the Court of Civil Appeals in each of the three cases, refused to hold that the anti-trust statutes entered into or became part of the charter of the Shippers Compress & Warehouse Co., or of the license granted to the plaintiffs in error in the case at bar.

The Supreme Court of Texas has never held that such statutes enter into and become parts of licenses granted foreign corporations or charters granted domestic corporations. It did not find it necessary to consider the question in denying Waters-Pierce Oil Co. a writ of error because it had already held that the statutes were free from constitutional objection, in *Houck vs. Brewing Association, 88 Texas, 184.* It did not so hold in *State vs. Shippers Compress & Warehouse Co.* (in which the ruling of the Court of Civil Appeals in *Waters-Pierce Oil Co. vs. Texas* was vigorously attacked in argument), but based its decision, as already stated, upon the ground that while such statutes were unconstitutional as to individuals, under the decision of this court in *Connolly vs. Union Sewer Pipe Co.*, yet they were valid as to corporations.

The case at bar then comes to this court without a finding by the State court that the anti-trust statutes entered into and become a part of the license granted the Plaintiff in Error as was the case in *Waters-Pierce*

Oil Co. vs. Texas; and whatever may have been its power in the premises, if such ruling had been made by the State court in this case, it is clear that this court in the case as decided and presented, is at liberty to, and must determine for itself whether such statutes are parts of the contract between the State and the Plaintiff in Error.

We proceed now to consider that question. We may concede for the purposes of this case, the power of the State, when granting foreign corporations license to transact business within its territory, to impose any conditions it deems proper. We may likewise concede the power of the State in chartering corporations, or in enacting general laws providing for their creation, to impose such restrictions and conditions as it may deem proper.

We may also concede, that any law amending the general corporation statutes, or particularly designed to restrict or define the *powers* of corporations, enter into and become parts of the charters of all corporations subsequently formed. And under the reserved power of the Legislature to alter, reform or amend corporate charters, such laws under certain limitations are applicable to corporations previously created, if intended to apply thereto with respect to subsequent transactions.

The question in this case, therefore, is not what the Texas Legislature *may do*, but what it *has done*—not whether the Legislature may prohibit foreign corporations and new domestic corporations from forming combinations in restraint of trade, while permitting indi-

viduals, firms and old corporations to do so, but whether the Legislature *intended* to so enact.

We need not dispute the right of the Legislature by *amending* Chapter 17, Title XXI, of the Revised Civil Statutes or even by a separate act *expressly relating* to foreign corporations, to impose further restrictions upon them. Neither is it necessary to deny the power of the Legislature, by an amendment of Chapter 3, or any other part of Title XXI, of the Revised Statutes, or even by a separate act specially relating to domestic corporations, to restrict their power to contract.

But the anti-trust statutes are not of that character. If the Legislature intended merely to change the conditions upon which foreign corporations should be admitted to the State, or to make new contracts imposing additional restrictions upon them, no doubt it would have amended the chapter of the Revised Statutes which prescribes the conditions upon which they shall be admitted, or at least have passed an act relating specially and particularly to them. If it had intended to further restrict the powers and privileges of domestic corporations it would have amended the title of the statutes providing for their creation and defining their powers or enacted some act designed expressly to further limit and restrict their corporate powers.

What was the purpose of the anti-trust statutes? Was it to alter or amend the powers of existing corporations and restrict the powers to be acquired by new corporations, or was it to suppress and prohibit trusts and combinations in restraint of trade, by any persons whomsoever? In other words, are the acts in question

statutes merely for the regulation and restriction of corporate powers, or for the suppression of trusts?

The answer is afforded by the statutes themselves —even by their titles. The Act of 1889 is entitled "An act to define trusts and to provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas." The title of the Act of 1895 is the same. That of the Act of 1899 is "An act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles; to prevent the formation or operation of pools, trusts, monopolies and combinations," etc.

Turning to the body of the acts of 1889 and 1895, we find that Section 1 defines the combination prohibited as "a combination of capital, skill or acts by two or more *persons, firms, corporations* or *associations of persons*, or of either two or more of them, for either, any or all of the following purposes," etc. The act of 1899 applies to any corporation "or any *partnership* or *individual* or other *association* of *persons* whatsoever." The acts of 1889 and 1895 provide that any person who forms, enters into, carries out or aids in carrying out the combinations prohibited shall be punished by fine of not less than fifty dollars nor more than five thousand dollars, and by *imprisonment in the penitentiary* not less than one or more than ten years, or by either such fine or imprisonment, and that each day during a violation of the act shall constitute a separate offense. The act of 1899 provides (Section 5) that "any *person, partnership, firm or association*, or any representative or agent

thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this act shall forfeit not less than two hundred dollars nor more than five thousand dollars for each such offense, and each day such person, corporation, partnership or association shall continue so to do shall be a separate offense," etc., and in addition to this, in the case of corporations, forfeiture of corporate rights shall be a further penalty.

It is obvious from these and other provisions of the acts that they were not intended as a regulation of corporations as such, or as amendments of or supplements to the statutes providing for the creation and regulation of corporotions, domestic or foreign, or as merely a restriction of their corporate powers. The whole purpose and object of the legislation was to *suppress trusts.* The statutes were intended to reach and prohibit trusts and combinations in restraint of trade, and to apply to individuals, persons and firms equally with corporations —the only exception being in favor of agriculturalists, stock raisers and laborers.

If they constitute a part of the system of corporation laws of the State, if they were designed as amendments of or supplements to the statutes providing for the creation and defining the powers of private corporations, then it may be that they enter into and become a part of the charter of every corporation formed under them precisely as if written therein at length. We do not contend that this depends upon the particular place in the statute laws which such corporation acts should occupy. But we do insist that, in order to be accounted

as an act for such purpose, it must relate to that purpose, be designed for that purpose, be entitled for that purpose and be addressed to that purpose, and no other, in order that persons organizing and dealing with corporations may know the obligations assumed and the scope and limits of the corporate powers which may be exercised.

Every one is, of course, charged with knowledge of all general laws; and laws which prohibit certain acts, whether by corporations or individuals, are necessarily notice to such corporations and to persons dealing with them, as well as to other individuals. But such laws are merely a part of the whole body of police and governmental regulations established by the State, and by their terms operate upon all alike. They are no more binding upon and no more relate to corporations than to individuals. They apply equally to each. If valid, they apply to all. If invalid, they bind none. They are not corporation laws at all, but general police regulations. A statute enacted to restrict or define corporate powers becomes a part of corporate charters and of the contract between the State and the corporation. and as between the State and corporations formed after its enactment it is a question of *contract* and not of *law*. But if it is not a part of the system of statutes authorizing the creation of corporations, defining their powers and establishing conditions of their existence; if it is merely a general police regulatian, applicable to all persons—individual as well as corporate—it is not and cannot, in the very nature of things, be any part of the contract between the State and the corporation, or be

among the burdens or conditions assumed by the incorporators.

The right of the State to forfeit the license of the defendant in the case at bar depends upon the conditions annexed expressly or by implication to the grant made by the license. If the anti-trust statutes were a part of the contract and have been violated, the forfeiture may be enforced, but if they were not, then they do not enter into the contract at all, but are mere *statutes*, not *contracts*, and their validity may be contested by this defendant, as well as by an individual.

While corporations are not "citizens," within the meaning of Section 2, Article IV, of the Federal Constitution, providing that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" (*Paul vs. Virginia, 8 Wall., 168; Blake vs. McClung, 172 U. S., 239*), yet they are "persons" within the meaning of the fourteenth amendment, and may invoke that provision against the taking of their property without due process of law, and the denial of the equal protection of the laws (*Santa Clara County vs. Southern Pacific R. Co., 118 U. S., 394; Covington Turnpike Co. vs. Sandford, 164 U. S., 578, 592; Smythe vs. Ames, 169 U. S., 466, 522*); and this is true of a foreign corporation which has obtained a license to transact business in the State (*Blake vs. McClung, supra*).

All persons forming corporations under the laws of a State are entitled to the benefit of these constitutional provisions and may interpose them against any statute that denies to such corporation the equal protection of

the laws, or that provides for the taking of its property without due process of law. If the statute is a part of the law authorizing the creation of the corporation and defining its powers, then it may be conceded that the corporation may thus by contract barter away the equal protection of the laws guaranteed by the Federal Constitution in order to secure the right of corporate existence.

But, obviously, it should not be lightly held that any person or set of persons have relinquished the rights guaranteed by the Constitution. It should appear beyond question that they have done so, and must have intended to do so, before it should be so held. Is it reasonable, to hold that such rights have been relinquished by agreement, merely because there is, upon the statute books, an act which the title does not show and which the language does not show to have been intended as an amendment or supplement to previous statutes creating and specially restricting corporations—a statute which by its terms expressly and plainly shows was not designed as an amendment of the corporation laws, or as dealing with corporate powers—a statute intended for a wholly different purpose, and which was designed to apply to individuals, firms and associations of persons, whether corporate or otherwise—a statute not intended to apply merely to a single or limited class of persons or corporations, but designed to apply to and prohibit a class of *acts* and *transactions* no matter by whom committed. Obviously, the statute is aimed at *acts and transactions*, and not at *persons* or *corporations*. They are affected by it only as they commit or

participate in the prohibited acts; and when that appears, they are subject to the act, whether they be individuals, firms or corporations. The character of the offender is absolutely of no consequence. It may be that of an individual, a firm or a whole community, a domestic corporation or a foreign corporation. It is the kind of *transaction*, and in no sense the kind of *person*, that determines the application of the statute.

When foreign corporations apply for a license or when individuals associate themselves together for the purpose of forming a corporation, they look, and are only required to look, to the statutes admitting foreign or providing for the creation of domestic corporations and defining and limiting their powers and privileges. If it appears therefrom that the powers granted are sufficient to accomplish the purpose in view, and the burdens and conditions imposed thereby are no more than the applicant or the incorporators are willing to assume, the corporation is formed; and such statutes enter into and become a part of the contract between the company and the State. The charter is filed and accepted, or the license granted, and thereupon the contract is completed. The corporation is brought into existence, and thereafter it is subject, just as other corporations and individuals are, to all the police powers and general laws of the State. It is a "person" within the Federal Constitution, and is entitled to protection in its property rights and against class legislation. So long as it complies with the conditions of its charter and keeps within the scope of its powers it is entitled to all the protection

afforded "persons" by the Constitution. If the State, by existing laws, or by subsequent legislation, prohibits certain acts or transactions, it is bound thereby equally with other persons, and no further. If such laws contravene the Federal Constitution, it necessarily follows that it has the same right to attack them as other persons have. If the incorporators find upon the books a statute not relating exclusively to corporations, but only to particular transactions regardless of the parties thereto, which is in contravention of the Constitution, they may disregard it, just as all others may do. It is not made a part of the charter, but is a general police act. An unconstitutional statute binds no one and is notice to no one. Why should incorporators or stockholders of corporations be bound to take notice of it or regard it when all others may safely ignore it?

When the charter is filed and accepted, the corporation is brought into existence as a *person*. The act is completed. Its future conduct is subject to and is to be regulated by the same laws that regulate the conduct of others. It may be subjected by reason of its peculiar character to a different penalty from that inflicted upon individuals, just as provided in the anti-trust statutes. But the penalty follows, and is inflicted only *after* the unlawfulness of the act is established. The first enquiry is, whether the conduct is unlawful. That depends necessarily upon the validity of the statute prohibiting it. If unconstitutional, the law is void, and there is no offense to be punished. In determining whether the conduct in question is unlawful, the corporation is entitled to the same defenses and to the same due

process of law as other persons, whether individual or corporate, and its liability must be established *before* the question of penalty is considered. But, in the present case, it is proposed to inflict the penalty wholly without regard to the question whether the conduct is unlawful.

We submit, in conclusion upon this point, that the anti-trust statutes are no part of the contract between defendant and the State; that they were only designed to prohibit certain transactions and conduct by any and all persons, whether individual or corporate; that they only apply to corporations incidentally and according to their *conduct*, irrespective of their *character* as corporations; that in defending its conduct, plaintiff in error is entitled to interpose any defense that is allowed other persons; and that, since the statutes are in contravention of the Federal Constitution, they are ineffectual to make plaintiff's conduct unlawful, and, therefore, the penalty of forfeiture cannot be inflicted for doing that which is not prohibited by any valid law.

Fifth Point.

THIS COURT HAS NEVER HELD THAT A STATE STATUTE WHICH VIOLATES THE FEDERAL CONSTITUTION IS BINDING UPON A CORPORATION OR IS VALID IN ANY RESPECT.

We have endeavored to show that the decision of this Court in *Waters-Pierce Oil Co. vs. Texas* was controlled by the finding of the State Court in that case

to the effect that the anti-trust statutes entered into and became a part of the contract between the State and the defendant corporation by which the latter was admitted into the State; and that consequently it is not authority for the proposition asserted on behalf of the State of Texas in this case that State laws in violation of the Federal Constitution may be imposed, nevertheless, upon foreign corporations. There is no other decision of this Court in which the vicious doctrine sought to be predicated upon that case can find support, but there are many cases from which it is apparent that this Court does not attribute to its decision in that case the effect given it by the Supreme Court of Texas and various State authorities in the effort to outlaw foreign corporations.

In *Dayton Coal and Iron Co. vs. Barton, 183 U. S., 23*, this Court said (p. 24):

> "We do not care, however, to put our present decision upon the fact that the plaintiff in error is a foreign corporation nor to be understood to intimate that state legislation invalid as contrary to the Constitution of the United States can be imposed as a condition upon the right of such a corporation to do business within the State."

In *W. W. Cargill Company vs. Minnesota, 180 U. S., 452*, also decided since *Waters-Pierce Oil Co. vs. Texas*, this Court again said (at page 468):

> "The defendant however insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted

all of its provisions, and (in the same words of the statute) 'thereby to have agreed to comply with the same.' § 1. *The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the State Railroad and Warehouse Commission that are repugnant to the Constitution of the United States.* A license will give the defendant full authority to carry on its business in accordance with the valid laws of the State and the valid rules and regulations prescribed by the Commission. If the Commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with *rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings.*"

In the still more recent case of *Cable vs. United States Life Insurance Co., 191 U. S., 288*, this court indicated unmistakably that it had never decided that a corporation could be bound by an unconstitutional State statute. In that case the court, through Mr. Justice PECKHAM, said (191 U. S., 306, 307):

"In Doyle vs. Continental Insurance Co., *supra*, it was held that a State had the right to impose conditions not in conflict with the Constitution or the laws of the United States, to the transaction of business within its territory by a foreign insurance company, and to exclude such company from its

territory, or, having given a license, to revoke it, with or without cause, and it was further decided that an injunction to restrain a state officer from revoking and cancelling a license to a foreign company to do business within the State, because the company has, contrary to the state statute, removed a case from the state to the Federal court, would not be granted, and it was remarked that, as the State had the right to exclude a foreign insurance company, the means by which she caused such exclusion or the motives of her action were not the subject of judicial inquiry. *Whether this case has been shaken by the subsequent cases of Barron vs. Burnside, 121 U. S., 186, 199; Blake vs. McClung, 172 U. S., 239, 254, and Dayton Coal & Iron Co. vs. Barton, 183 U. S., 23, 25, it is not material here to discuss.* It has from an early day been held that a corporation created by one State could transact business in another State only with the consent, expressed or implied, of the latter State, and that such consent might be accompanied by such conditions as the latter State might think fit to impose, *provided they were not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State free from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.*"

In *O'Brien vs. Wheelock, 184 U. S., 450*, this court quoted with approval, at page 489, the following from its opinion in *South Ottawa, vs. Perkins, 94 U. S., 267:*

"'There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law,

according as the truth of the fact may be, and not according to the shifting circumstances of parties. *It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party;* a law to-day and not a law to-morrow; a law in one place and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case.'"

And the decision of the court in *Connolly vs. Union Sewer Pipe Co., 184 U. S., 540*, is utterly inconsistent with the proposition claimed to have been sustained in *Waters-Pierce Oil Co. vs. Texas.*

In that case an action brought in Illinois by the Union Sewer Pipe Co., a foreign corporation doing business in that State, to recover the price of pipe sold in that State, in which the defense relied upon was Section 10 of the anti-trust statutes of that State, providing that

"'Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the price or payment of such article or commodity and may plead this act as a defense to any suit for such price or payment'" (see p. 554 of Connolly case).

This court held that such defense was not good in view of the unconstitutionality of the statute upon which it was based and that the foreign corporation

was therefore entitled to recover the price of the goods sold.

After referring to certain provisions of the Statutes of Illinois, relating to foreign corporations, this court, through Mr. Justice HARLAN, said (184 U. S., 557–558):

> "These matters are called to our attention as showing—as undoubtedly they do—that the Union Sewer Pipe Company, while doing business in Illinois, was subject to the statute of Illinois concerning trusts or combinations, and which, in terms, applies to both domestic and foreign corporations. *But the question remains to be decided whether the statute is repugnant to the Constitution of the United States. If it be, then it is not law and cannot be applied for the purpose of defeating the plaintiff's claims in these actions.*"

That case is absolutely inconsistent with *Waters-Pierce Oil Co. vs. Texas*, unless the latter turned, as we insist that it did, upon the finding of the Court of Civil Appeals that the anti-trust statutes entered into and were a part of the system of statutes of Texas prescribing the conditions upon which foreign corporations should be admitted. The cases cannot be distinguished, as intimated by the Texas Supreme Court, upon the ground that *Waters-Pierce Oil Co. vs. Texas* was an action to revoke the license granted by the State to transact business, and not for any pecuniary penalty or for the impairment of any property rights. There is no substance in any such distinction. It is true that *Doyle vs. Insurance Co., 94 U. S., 535*, which is the strongest case in support of *Waters-Pierce Oil Co. vs.*

Texas, the action was also for revocation of a license granted a foreign corporation. In that case, the Insurance Company signed a contract, to the effect that it would not remove cases to the Federal courts. The State insisted that it do this, as a preliminary condition to its being permitted to do business within the State. Its offense was, that it did remove a case to the Federal courts, yet, notwithstanding this, the court refused to restrain the officers of the State from withdrawing its license.

If, as we insist, *Waters-Pierce Oil Company vs. Texas*, turned upon the *finding* of the Court of Civil Appeal, that the anti-trust statute was, or did become, a part of the license granted to the defendant in that case, then it, and *Doyle vs. Ins. Co.*, may be considered together; for, in the case of each, there was involved a breach of one of the preliminary conditions upon which they were permitted to do business within the State, and not merely a breach of a general statute. These cases may be, for this reason, in support of each other, but plainly distinguishable, for the same reason, from our case, where there was no such finding, and all the other cases in our brief, in support of our contention.

The effect of *Doyle vs. Ins. Co.* seems to be narrowed very much, in *Baron vs. Burnside*, 121 U. S., 186, where the court says, referring to it (p. 199):

> "The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction by a Court of the United States, from withdrawing it. All that there is in the case, beyond this, and all

that is said in the opinion which appears to be in conflict with the adjudication in Ins. Co. vs. Morse, must be regarded as not in judgment."

There are also here and there in opinions in other cases general expressions to the effect that a State may impose upon foreign corporations such conditions as it deems proper upon their right to transact business within its territory, and that upon a breach of such condition the corporation may be excluded. But nowhere has it been held that a statute prescribing fines and other punishments for violations of its provisions is enforceable so far as to warrant the forfeiture of a license granted a foreign corporation, but is unenforceable so far as it provides for the recovery of fines or the infliction of other punishment. If it is merely a matter of terms, if the power of the State is supreme, if the limitations of the Federal Constitution may be ignored by state legislation in dealing with these foreign corporations, why stop at forfeiture of license? Why not stipulate for pecuniary finds, or absolute confiscation, or other punishment. Nothing could be more illogical than the distinction which the Supreme Court of Texas seeks to draw in the decisions of this court by the interpretation placed by it upon *Waters-Pierce Oil Co. vs. Texas* in its opinion in *State vs. Shippers, &c., Co.*, which constitutes the ground of decision in this case.

There are many cases, some of them quite recent, in which this court has sustained legislation against foreign corporations challenged as in violation of the Federal Constitution, but none of them are based upon any such ground as that the only remedy sought by the

State was forfeiture of the corporate grants. *Fidelity Mutual Life Ass'n vs. Mettler*, *185 U. S., 308*, was not an action for the revocation of a license granted a foreign corporation, but was upon a policy of insurance; and the question was whether a State statute authorizing the recovery of counsel fees and a penalty in successful suits against Life Insurance Companies, while allowing no such recovery in other suits, was unconstitutional. *Iowa Ins. Co. vs. Lewis*, *187 U. S., 335*, and *Farmers, &c., Ins. Co. vs. Dobney*, *189 U. S., 301*, involved the same question as *Fidelity Mutual Life Ins. Co. vs. Mettler*, and were decided upon the authority of that case. *Hale vs. Lewis*, *181 U. S., 473*, was a controversy between the creditors of an insurance company, and not a proceeding in behalf of a State to revoke a license granted a foreign corporation. Neither was *Knoxville Iron Co. vs. Harbison*, *183 U. S., 13*, nor *Dayton Coal & Iron Co. vs. Barton*, *183 U. S., 23*, nor *Blake vs. McClung*, *172 U. S., 239*, nor *Ashley vs. Ryan*, *153 U. S., 436*, nor *Orient Ins. Co. vs. Daggs*, *172 U. S., 557*, nor *Hooper vs. California*, *155 U. S., 648*, nor *Hancock Mutual Life Ins. Co. vs. Warren*, *181 U. S., 73*, nor *Mutual Life Ins. Co. vs. Spratley*, *172 U. S., 602*, nor *New York Life Insurance Co. vs. Cravens*, *178 U. S., 389*, an action in behalf of a State for forfeiture of a corporate license granted to a foreign corporation, although each of them sustained the validity of State legislation imposing restrictions upon and regulating the business of corporations.

While the power of the State to impose terms upon a foreign corporation seeking admission was distinctly

recognized, yet *Fidelity, &c., Ass'n vs. Mettler, 185 U. S., 308; Iowa Life Ins. Co. vs. Lewis, 187 U. S., 335; Farmers, &c., Ins. Co. vs. Dobney, 189 U. S., 301; Hale vs. Lewis, 181 U. S., 473; Orient Ins. Co. vs. Daggs, 172 U. S., 557; Hooper vs. California, 155 U. S., 648; Hancock Mutual Life Ins. Co. vs. Warren, 181 U. S., 73; Mutual Life Ins. Co. vs. Spratley, 172 U. S., 602*, and *New York Life Ins. Co. vs. Cravens, 178 U. S., 389*, are clearly distinguishable from *Connolly vs. Union Sewer Pipe Co.* and other cases in which this court has protected foreign corporations against unconstitutional State legislation, upon the ground that the corporations involved were *insurance companies*. That the peculiar nature of the insurance business justifies and even requires special legislation of corporations engaged therein has been universally recognized; and legislation dealing with such corporations differently from other corporations and individuals has never been regarded as an unreasonable classification. That was the real ground of the decision of this court in *Fidelity Mutual Life Ass'n vs. Mettler*, as shown by the following language of Chief Justice FULLER in that case (185 U. S. 308, 326):

> "It is apparent from the various sections of the title relating to insurance, to which we have before referred, that this particular liability amounted to one of the conditions on which life and health insurance companies were permitted to do business in Texas, and the power of the State in the matter of the imposition of conditions on its own and foreign corporations, has been repeatedly recognized by this court. If, however, notwithstanding the accept-

ance of these conditions, the constitutionality of the particular condition were nevertheless open to question, we must decline to sustain the objection. The reasoning in Railroad Company vs. Matthews, 174 U. S. 96, applies rather than that in Railway Company vs. Ellis. The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to refine as to the distribution of such profits), and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured."

Indeed we feel safe in saying that in every case in this Court, when properly understood, it will be found that the statute in question was sustained upon the ground that it involved no unreasonable classification, or that it was a mere limitation of corporate powers such as a State might impose in creating corporations; and that in no case has a corporation after being brought into existence or being admitted into a State, been held to be beyond the protection of the Federal Constitution

in respect of the rights guaranteed all persons and been compelled to submit to a law adjudged by this Court to be unconstitutional.

Sixth Point.

THE CONTENTION THAT A CORPORATION MAY BE BOUND BY A STATUTE WHICH VIOLATES THE FEDERAL CONSTITUTION IS UNSOUND AND DANGEROUS IS CONTRARY TO MANY DECISIONS OF THIS COURT.

The construction placed by the Supreme Court of Texas upon the decision of this court in *Waters-Pierce Oil Co. vs. Texas*, 177 U. S., 28, is not only without warrant in that case, but is opposed to many decisions of this court before and since. We have endeavored already to show, by referring to the decisions rendered since that case was decided, that this court had no thought, at that time, of holding that corporations, although recognized as "persons" within the protection of the Federal Constitution, and although admitted into the State for the purpose of transacting business might yet be by such State practically outlawed and deprived of rights derived from the Constitution of the United States. While recognizing the right of the States to exclude foreign corporations from their territorial limits or to impose terms upon their admission, yet this court has never failed to hold, when the question has been fairly presented that the States could not deprive them of rights enjoyed under the Constitution of the United States.

In the early case of *Insurance Co. vs. French*, *18 How.*, *404*, Mr. Justice CURTIS, speaking for this court, said (at p. 407):

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied of the latter state. Bank v. Earle, 13 Pet., 519. This consent may be accompanied by such conditions as Ohio my think fit to impose, and these conditions must be deemed valid and effectual, by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

The case of *Home Insurance Co. vs. Morse, 20 Wall., 445*, is a leading case. It appears therefrom that a statute of Wisconsin provided that any foreign fire insurance company desiring to do business in Wisconsin, should designate an agent upon whom process might be served, "containing an agreement that such company will not remove the suit for trial into the United States Circuit or Federal Courts."

The Home Insurance Company designated an agent, and the instrument designating him contained such a stipulation. This action was begun against the company and the company filed its petition for removal which was denied, and the company brought its writ of error.

HUNT, J., said (p. 450):

"Is the agreement thus made by the insurance company one that, without reference to the statute, would bind the party making it? * * *

"We see no difference in principle between the

cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. * * * any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions whenever the case may be presented.

" That the agreement of the insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void. * * *

(P. 453) " Does the agreement in question gain validity from the statute of Wisconsin, which has been quoted? Is the statute of the State of Wisconsin, which enacts that a corporation organized in another state shall not transact business within its limits, unless it stipulates in advance that it will not remove into the Federal courts any suit that may be commenced against it by a citizen of Wisconsin, a valid statute in respect to such requisition, under the Constitution of the United States? * * *

"The jurisdiction of the Federal courts, * * * depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the Federal courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution. * * *

The court referred to the removal statute and said (p. 454): "This applies to all the citizens of another state, whether corporations, partnerships, or individuals. It confers an unqualified and unrestrained right to have the case transferred to the Federal courts upon giving the security required. * * *

"The statute of Wisconsin, however, provides as to a certain class of citizens of other States, to wit, foreign corporations, that they shall not exercise that right, and prohibits them from transacting their business within that State unless they first enter into an agreement in writing that they will not claim or exercise that right.

"The Home Insurance Company is a citizen of New York, within this provision of the Constitution. * * *

"We are not able to distinguish this agreement and this requisition, in principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation.

"The State of Wisconsin can regulate its own corporations, and the affairs of its own citizens, in subordination, however, to the Constitution of the United States. The requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the Constitution of the United States. A foreign citizen, whether natural or corporate, in this respect possesses a right not pertaining to one of her own citizens. There must necessarily be a

difference between the status of the two in this respect.

"We do not consider the question whether the State of Wisconsin can entirely exclude such corporations from its limits, nor what reasonable terms they may impose as a condition of their transacting business within the state. * * *

(p. 458) "On this branch of the case the conclusion is this:

"1st. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the act of 1789.

"2d. The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3d. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed."

In *Barron vs. Burnside, 121 U. S., 186*, it appears that Barron was charged with knowingly assisting the C. & N. W. Ry. Co. to transact business in the State of Iowa, said Company not having a permit. The statute as to foreign corporations doing business in the State required that the application "contain a stipulation that said permit shall be subject to each of the provisions of this act." One of the provisions of the act was that (see p. 187 of Barron case):

"'Any foreign corporation sued or impleaded in any of the Courts of this State upon any contract

made or executed in this State or to be performed in this State or for any act or omission, public or private, arising, originating or happening in the State, who shall remove any such cause from such State Court into any of the federal courts held or sitting in this State, for the cause that such corporation is a non-resident of this State or a resident of another state than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this State; such forfeiture to be determined from the record of removal, and to date from the date of the filing of the application on which such removal is affected.'"

The C. & N. W. Ry. Co. had not obtained a permit. The engineer was indicted under a provision of the statute, making it a penal offense to be engaged in the work of such a corporation. The court said (p. 197):

"It is apparent that the entire purpose of this statute is to deprive the foreign corporation, in suits such as those mentioned in Sec. 3, of the right conferred upon it by the Constitution and laws of the United States to remove a suit from the State court into the Federal court, either on the grounds of diversity of citizenship or of local prejudice. The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation with the Secretary of State, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the State, might not be an

unreasonable or objectionable requirement, if standing alone; but the manner in which, in this Statute, the provisions on those subjects are coupled with the application for the permit, and with the stipulation referred to, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the Federal Court.

"In view of these considerations, the case falls directly within the decision of this Court in Home Insurance Co. v. Morse, 20 Wall., 445. * * * (p. 199).

"The case of Doyle v. Continental Insurance Co., 94 U. S., 535, is relied on by the defendant in error. * * *

"In both of the cases referred to, the foreign corporation had made the agreement not to remove into the Federal court suits to be brought against it in the State court. In the present case, no such agreement has been made, but the locomotive engineer is arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the Federal courts suits brought against it in the State court, as a condition of obtaining a permit, and consequently has not obtained such permit. Its right equally with any individual citizen, to remove into the Federal court under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day. * * *

"*As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitu-*

tion and laws of the United States, the statute requiring the permit must be held to be void."

Barron vs. Burnside, as intimated by Mr. Justice PECKHAM in *Cable vs. U. S., &c., Ins. Co., 191 U S., 288*, is inconsistent with and directly opposed in principle to *Doyle vs. Continental Ins. Co., supra.* If a State can exclude a corporation from its territory for violating a statute, although containing a provision which cannot be enforced, as held in *Doyle vs. Continental Insurance Co.*, it seems clear that the prohibition of a foreign corporation to do business in the State, without obtaining a permit, should be effective to keep such corporation out of the State, if it did not obtain the permit, and yet in *Barron vs. Burnside* it was held that it could not be excluded where submission to an unconstitutional requirement was a condition of the permit.

In line with *Insurance Co. vs. Morse*, and *Barron vs. Burnside*, are *Southern Pacific Co. vs. Denton, 146 U. S., 202; Barrow Steamship Co. vs. Kane, 170 U. S., 100, 111; Chicago, M. & St. P. Ry. Co. vs. Becker, 32 F. R., 849* (NELSON, J.); *Chattanooga R. & C. R. Co. vs. Evans, 66 F. R., 809, 814* (LURTON, J.); *Reimers vs. Seatco Mfg. Co., 70 F. R., 573* (TAFT, C. J.).

It is true that these cases involved statutes which required foreign corporations, as one of the conditions imposed in granting the license, to refrain from removing such suits as might be brought against them, into the courts of the United States. But we maintain that this does not in any wise affect the principle. We sub-

mit that the provision of the Constitution of the United States relating to the Federal Courts is no more sacred than any other provision; and that the option given a foreign corporation to remove into the Federal Courts suits brought against it—a right indeed derived from Congress rather than the Constitution—is no more inalienable than the right to due process of law and to the equal protection of the laws guaranteed by the Fourteenth Amendment. If a statute which requires a corporation to waive a right it has to remove suits against it into the Federal Court—a right which it may exercise or not at its option—is contrary to the Constitution and laws of the United States and void, it would seem that a statute which requires it to waive the right to due process of law and the equal protection of the laws guaranteed by the Constitution would even be more objectionable.

Furthermore, we insist that any State statute which requires any individual, corporation or other "person" to waive any right guaranteed by the Constitution of the United States, is against the public policy of the United States, and being against the Constitution, the benefit of which it is designed to impair, it is void. An agreement to violate a statute of the United States would be void, of course. So would a state statute designed to compel, or to excuse, the violation of a Federal statute or the Federal Constitution. Is not an agreement which requires one party to it to relinquish a right guaranteed by the Constitution of the United States—such, for instance, as the right to due process of law and to the equal protection of the laws,—as

vicious and as illegal in principle and as much against public policy as an agreement to disobey, or a statute designed to require or excuse the disobedience of a national law?

An agreement between individuals waiving their right to due process of law and to the equal protection of the laws would be held invalid, we suppose; and any state statute seeking to require individuals to waive such rights would doubtless be promptly declared void. If invalid as to individuals, such a statute must be invalid as to corporations. It is settled in this court that a corporation is a "person" within the protection of the Fourteenth Amendment as much as an individual. If a law or contract which requires one of such "persons" to waive the right thus guaranteed is illegal and against the public policy of the United States, it must be as illegal and as much against public policy to require another to do so.

Of course, we are not questioning the right of a State in creating corporations to invest them with such powers and such only as it may deem proper. It may refuse to create corporations altogether; it may create them for one purpose and not for another; it may authorize them to engage in one line of business and not another; and it may allow them to exist for such period and upon such lawful conditions as it may choose to prescribe. The power thus possessed with respect to corporations of its own creation a State enjoys of course with respect to foreign corporations within its territory.

But the point we make is, that if a State elects to create a corporation or to admit a foreign corporation,

when created or admitted they become persons within the protection of the Fourteenth Amendment of the Federal Constitution. The State may refuse to create or to admit them, or it may impose conditions not in derogation of the Constitution or laws of the United States. But it cannot create or admit them on condition, for instance, that they shall not pay the imposts or excise duties levied by the United States, or that they will not remove suits into the courts of the United States, or that they will not comply with the postal laws and regulations of the United States, or that they shall obstruct the enforcement of the laws of the United States. Such conditions would be void because in derogation of the Constitution and laws of the United States. It would seem equally clear that the State cannot impose the condition that they will not invoke that provision of the Fourteenth Amendment which prohibits the taking of property, etc., without due process of law, or that they shall not challenge any law of the State upon the ground that it denies to them the equal protection of the laws guaranteed by the Federal Constitution. All such conditions are simply beyond the power of the State to require. *Such conditions are not corporate powers.*

The State may grant corporate powers or it may withhold them. But we deny absolutely that a State, by virtue of its power to create, or refuse to create corporations, or to admit or refuse to admit foreign corporations, has any power to couple the corporate powers it may choose to grant with conditions impairing any right that would otherwise exist under the National laws or Constitution.

The general expression that a State has the right to "exclude foreign corporations altogether, or in admitting them, may impose such conditions as it deems proper," is entirely too broad. There has been no case in this court calling for the announcement of any such doctrine and no occasion as yet to determine just what are the precise limitations to be placed upon the general statement of the proposition. We earnestly maintain that the conditions which the State may impose are such as limit or relate to the business which the corporation may transact, the taxes or fees it shall pay, the reports and returns it shall make, the term during which and the places at which its business shall be transacted, and other restrictions upon the exercise of its *corporate powers*. The corporation may, under its Charter, possess many powers which a State may deem it inexpedient for corporations to exercise, or a State may deem it proper to restrict the business of the corporation to certain lines, or to particular localities. Conditions and restrictions which particular States, without violating any principle of public policy or impairing any right under the Constitution or laws of the United States, may, with perfect propriety, impose upon corporations, are too varied and numerous to specify. It is conditions, consistent with the powers which every state has to *create and regulate corporations* generally, that the States have the right to impose upon foreign corporations; and not conditions contrary to the public policy of the United States or in derogation of rights under the Constitution or laws of the United States.

The proposition that a corporation is to be bound by an unconstitutional law which happens to be upon the statute books of the State at the time of the creation or admission of a corporation will lead, if sustained, to endless confusion in the law of corporations, and to the practical destruction of much property now existing in that form. How is it to be determined what is the law and what is not the law, if the Constitution shall cease to be the guide? If statutes—such as the Anti-trust Act of Illinois considered by this court in *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540, and such as the anti-trust statutes of Texas involved in this case,—which are in plain violation of the Constitution of the United States because of the discriminating provisions which they contain, are nevertheless laws of the State as against corporations, what act or publication emanating or purporting to emanate from the State may not be a law? And shall such unconstitutional, but none-the-less binding "laws" be limited to acts of the legislature or be made to embrace mere legislative bills and, perhaps, departmental orders?

The Texas Constitution, like that of most of the States, imposes many restrictions and regulations upon the legislature, and a statute may be void for the violation or disregard of any of these provisions. Section 29, Article 3, prescribes the enacting clause of all statutes; and the Supreme Court of Texas has held that a statute, although duly passed and published, which does not contain such clause, is void. After the first statute, which was passed in Texas prescribing the system of text books for the public schools of the State, was pub-

lished among the laws of the session, and the legislature had adjourned, it was discovered that the enacting clause had been omitted, and, of course, there was no effort made to enforce it as it was a mere nullity. Suppose it were a law affecting corporations, would they be bound by it or not?

Sections 30, 31, 32, 33 and 34 of Article 3 of the Texas Constitution impose certain conditions and restrictions upon the Legislature in passing laws, the non-observance of which by the Legislature may or may not be fatal. Section 35 provides that no bill shall contain more than one subject, which shall be expressed in its title, and the Supreme Court of Texas has held that a statute contrary to this provision is void. Section 36 provides that no law shall be revived or amended by reference to its title, and the Supreme Court of Texas has held that a statute passed contrary to this provision is also void. Section 38 requires the signature of the presiding officer of each House, and if omitted, the statute is void. Section 40 prohibits legislation at a called session upon any subject not specified in the proclamation of the Governor; and a statute passed upon any subject not thus specified is void.

What will be the effect of statutes thus enacted in disregard of the State Constitution and how far will they be binding upon corporations if this new doctrine is sustained by this court? How will incorporators and stockholders know what is a statute and what is not a statute?

Seventh Point.

ALL OF THE ANTI-TRUST LAWS OF TEXAS ARE ALSO IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT FOR THE REASON THAT THEY NECESSARILY DEPRIVE PERSONS OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW, IN THAT THEY DENY ALL PERSONS THE RIGHT TO MAKE ANY CONTRACT, IN THE ORDINARY COURSE OF BUSINESS AND ON ORDINARY BUSINESS SUBJECTS, WHICH TENDS TO RESTRICT COMPETITION, OR TRADE, COMMERCE OR BUSINESS, OR IN ANY MANNER TO AFFECT PRICES.

If this court shall hold, contrary to our contention, that the Anti-Trust Act of 1899 is unaffected by the discriminating provisions in the Acts of 1889 and 1895 and in the Revised Statutes and Penal Code, and that, therefore, the Act of 1899 is free from the objection that it is class legislation, there will still remain the question whether it is contrary to that provision of the Fourteenth Amendment declaring that no State shall deprive any person of life, liberty or property without due process of law, in that it destroys the liberty of contract and the right to employ property in business in ordinary and customary ways.

In *Connolly vs. Union Sewer Pipe Co.*, 184 U.S., 540, at page 565, in passing on the constitutionality of the similar law of Illinois, copied from the Texas Statutes, this court, while condemning the law by reason of the unjustifiable exemption of favored classes from prosecution thereunder, declared that whether it was also within the prohibition against the deprivation of property with-

out due process of law, was a question which it was unnecessary to consider at that time.

That question has been twice argued in this court with reference to certain of the statutes of Texas now under consideration, first, in the case of *Baker v. Grice*, 169 U. S., 284, and again, in *Waters-Pierce Oil Company v. The State of Texas*, 177 U. S., 28. Both of these cases were decided on other points.

It will be difficult to do more than to repeat and apply the substance of the arguments then made by Mr. Choate, Mr. Johnson and Mr. Dodd, all of whom have probably given greater study to these particular questions than any other living members of the bar.

The analysis which we have already made of the Anti-Trust Laws of Texas demonstrates that those laws make it impossible for two or more persons, having a common business, lawfully to associate themselves in a partnership, or otherwise, and to carry on any ordinary business in an ordinary way.

2 Eddy on Combinations §§ 904–7.

We assume that the right of all persons to combine for the purpose of carrying on an ordinary business in the familiar and ordinary methods sanctioned by the continuous commercial usages of the Anglo-Saxon race and by the common law is one of the liberties protected by the Fourteenth Amendment of the Constitution of the United States. To impair this liberty of association in business enterprises and the ability to conduct a merchandising or other business in the ordinary way, through the making of purchases and sales

and the fixing of prices, is clearly to work a deprivation of property without due process of law, and to impair the well-recognized liberty of contract, involved in the acquiring, using, and dealing with property, protected by that amendment to the Federal Constitution.

The statutes are not specially aimed at corporations. They are broad so-called police regulations, applicable to all classes.

The plaintiff in error is *in the State without condition.* There is nothing peculiar in the qualities and characteristics pertaining to corporations which deprives them of any of the constitutional rights, with respect to property, the use thereof, and contracts with reference thereto, which are possessed by individuals. They are persons within the protection of the Fourteenth Amendment, and all their property rights are as fully protected by the Federal Constitution as are those of natural persons. It is settled by the decisions of this court that the Legislature cannot, even in the exercise of the reserved right to amend, alter or repeal the charter of a corporation, invade "the general right of a company to conduct and manage its own affairs," apart, of course, from the clear legislative right, in the proper exercise of the police power, to provide, by all proper measures, for the safety, health and general convenience and welfare of the public, and, generally, to impose proper limitations upon public-service corporations.

Lake Shore and Michigan Southern Railway Co. vs. Smith, 173 U. S., 684, at p. 691.

As to the police power, we are not concerned at this point. As the court said in the case last cited :

"To say that the Legislature has power to absolutely repeal the charter of the company and thus to terminate its legal existence does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the State over the conduct of the business of its creature. To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts" (pp. 697, 698).

The point is, that, aside from a proper exercise of the police power, and leaving out of view the limitations upon public-service corporations, the property rights of a trading corporation cannot be interfered with to any greater extent than can those of an individual. As this court further said in the same case (p. 698):

"The power to enact legislation of this character *cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means.*"

As this court said, in *Louisville & Nashville R. R. Co. vs. Kentucky*, 161 U. S., 677, at page 695, referring to the proper exercise of the police power and its necessary limitations:

"In other words, the Legislature may not destroy vested rights, whether they are expressly pro-

> hibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not."

In short, the vested right of ordinary business corporations in their property, and their vested right to deal with and use that property, for the benefit of their stockholders, in all proper ways, subject only to the usual and proper exercise of the police power, is as absolute as is the corresponding right in individuals, and the right and liberty of contract in respect to such property, and in the course of dealings therein, must be equally absolute in the case of corporations, and subject only to the same qualifications. As a recent text writer has said:

> "In every case where a restraint is imposed on corporations alone, the question ought to be: would the evil or danger sought to be met be exactly the same if the owner of the business or property would be an individual? If so, the discrimination is unjustifiable."
>
> *Freund on Police Power*, § 715, p. 736.

Here, it is clear that the statutes in question have not in terms been, and cannot by construction be, limited to corporations alone, and that, if by any chance they could be so limited, such an interference with the vested rights of corporations, with respect to their property and their contract rights in their dealings with reference thereto, and in the use of the same, would be construed as a wholly unjustifiable discrimination, and a plain violation of the rights protected by the Fourteenth Amendment.

See the recent exhaustive opinion on this whole subject in—

Ballard vs. Miss. Cotton Oil Co., 81 Miss., 507, 581-2.
2 Eddy on Combinations, §§ 660–673.

The laws in question are unlimited in scope and apply alike to *all* "*persons*," "*firms*," "*partnerships*," "*corporations*" *or* "*associations of persons.*"

A trust is defined to be—

> "A *combination of capital, skill or acts* by two or more *persons, firms, corporations or associations of persons*, or of either two or more of them, for either, any, or all of the following purposes"—

which are then specifically described and defined in the act.

A monopoly is defined in Section 2 of the Act of 1899 to be—

> "*Any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, custom, skill or acts, or of any other valuable thing or possession, by or between persons, firms or corporations*, whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished, or whereby any one or more of said purposes are *promoted or attempted to be executed or carried out*, or whereby the several results described herein are *reasonably calculated to be produced.*"

The purposes and results referred to in these several statutes are defined to be—

> "1. To *create or carry out restrictions in trade* or commerce or aids to commerce or to create or carry

out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

2. To *increase or reduce the price of merchandise, produce or commodities.*

3. To *prevent competition* in manufacture, making, transportation, sale or purchase of *merchandise, produce or commodities*, or to prevent competition in aids to commerce.

4. To *fix at any standard or figure, whereby its price* to the public shall be *in any manner controlled or established, any article or commodity of merchandise, produce or commerce* intended for sale, use or consumption in this State.

5. To *make or enter into or execute or carry out any contract, obligation or agreement* of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport *any article or commodity, or article of trade, use, merchandise, commerce or consumption* below a common standard figure, or by which they shall agree in any manner to *keep the price* of such article, commodity or transportation *at a fixed or graduated figure*, or by which they shall *in any manner establish or settle the price of any article* or commodity or transportation *between them or themselves and others*, TO PRECLUDE A FREE AND UNRESTRICTED COMPETITION AMONG THEMSELVES OR OTHERS in the sale or transportation of *any such article or commodity*, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that *its price might in any manner be affected.*"

R. S. of Texas, Article 5313.
Penal Code of Texas, Articles 988*a* and 976.

Or, as more concisely stated in the Act of 1899, Section 1, any *corporation or any partnership or individual or other association of persons* whatsoever shall be guilty of a conspiracy to defraud and be subject to the penalties of the Act if they—

> " shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding *with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price* of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, and product of mining, or *any article or thing whatsoever, or the price or premium to be paid for insuring property* against loss or damage by fire, lightning or storm, *or to maintain said price* when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, combination, contract, association or confederation to *fix or limit the amount or quantity* of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or *any article or thing whatsoever, or the price or premium to be paid for insuring property* against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any *corporation, partnership, individual or association of persons aforesaid.*"

We respectfully submit that a single article of any of these statutes makes impossible the conduct of the ordinary affairs of business life in the ordinary way.

It is impossible for two individuals to form a partnership, or bring into association in any other way the

separate and individual bussiness of each, without violating the terms of these statutes. It is within judicial knowledge that no such association or combination can possibly take place without in a measure restricting trade and commerce and limiting competition as between the persons associated, and so far as their combined business is concerned.

So, also, such an association will necessarily result in, and have for its object, the increasing the price of merchandise and produce, and in the course of their business association it will of course frequently become necessary for the parties, by agreement between themselves and in order to meet competition or work off surplus product, to reduce such prices. The inevitable result and the usual purpose of such associations of individual manufacturers and dealers is to prevent and reduce competition in manufacture and in the purchase and sale of merchandise.

So again, it is one of the deliberate purposes of every such association of individuals in trade to facilitate and make effective arrangements for fixing and maintaining prices.

No such association or partnership among individuals can possibly exist without fixing, maintaining, increasing and reducing the price of merchandise for the purpose of meeting competition and with a view of preventing competition, or without, in the language of these Acts, regulating, fixing and limiting the amount and quantity of their articles of manufacture and merchandise, that is to say, their stock and the output of their business.

In other words, these things are of the very essence of all business transactions, whether conducted individually or through the medium of such lawful associations of persons in partnerships, corporations and joint stock associations as have been customary, under the sanction of Anglo-Saxon institutions, for many centuries, and yet business cannot be done in these ways without violating almost hourly every one of the clauses of these Anti-Trust Statutes. If they should be enforced, as it was plainly intended by the Legislature that they should be, it would result simply in paralyzing all business whatever in the State of Texas, for they not only impair, but they necessarily absolutely destroy, all liberty of contract whatever in the carrying on of all lawful business.

Mr. Parsons defines a partnership (3rd Edition, p. 6) as

> "The *combination* by two or more persons of *capital, or labor or skill* for the purpose of business for their own benefit."

Chancellor KENT'S definition is equally explicit:

> "A *contract* of two or more competent persons to place their *money, effects, labor and skill*, or some or all of them, in lawful commerce, or business, and to divide the profit and bear the loss in certain proportions."
>
> 3 *Kent's Com.*, p. 23.
>
> 1 *Lindley on Partnerships* (4 Ed.), p. 3.

Intending the natural consequences of his own acts, as the law presumes, it is clear that every person entering into a partnership or other association or combina-

tion with another, which in itself must necessarily and naturally prevent competition at least as between themselves, violates, and must be assumed to intend to violate, the provisions of these laws on this subject, for that must be taken to be the purpose of such association or combination. In any event, within the language of the Act of 1899, such a union or combination of persons must be assumed to contemplate that their combination is "reasonably calculated" to produce one of the prohibited results.

In *Queen Ins. Co. vs. Texas* (86 Tex., 250, at p. 264), the court said:

> "A *contract* between two or more to do a thing is a 'combination of * * * acts' of such persons to bring about the performance of the contract."

And in *Texas and Pacific Coal Co. vs. Lawson* (89 Tex. Rep., 394, at p. 400) the Court said:

> "The portion of the act above quoted denounces as void and prohibits the enforcement at law or equity of *every contract* whereby a combination of capital, skill or acts is formed to create or carry out restrictions in trade or to prevent competition in the *sale or purchase of commodities*."

And in the same case it was said (at p. 401):

> "The word 'combination' as used in the statute means *union or association*"—

which words, it will be remembered, are carried into the law of 1899.

Thus, the statutes make criminal the doing by any two or more persons of any of the things specified in the

acts, all of which are essential to the ordinary conduct of business in the ordinary way, and also prohibit the entering into and carrying out by two or more persons of any of the contracts, obligations or agreements referred to—and this, *without any regard whatever to the nature of the subject-matter of the agreements, as to whether they injuriously affect the peace, order, life, health or general welfare of the community.*

2 Eddy on Combinations, §§ 905–907.

For present purposes we need not consider the question as to the possible unconstitutionality of these laws so far as they make criminal the union or combination of capital, skill and acts creating restrictions in trade, nor need we consider how far that question is affected by the decisions of this court on the Federal Anti-Trust Act.

U. S. vs. Trans-Missouri Freight Ass., 166 U. S., 290.
U. S. vs. Joint Traffic Ass., 171 U. S., 505.
Northern Securities Co. vs. U. S., 193 U. S., 197.

These acts make criminal all combinations or associations the purpose or result of which is "to prevent competition" or "preclude a free and unrestricted competition among themselves or others", and prevent any agreement by any union or association of persons whatever which might *in any manner increase, reduce, fix, regulate or maintain prices, or by which prices might be "affected."*

While it is true, as observed by Mr. Justice PECKHAM in *U. S. vs. Joint Traffic Ass'n* (171 U. S., at

p. 567), that the formation of a corporation or a partnership can hardly be deemed to be, in a technical sense, in restraint of trade or commerce, yet it is very clear that such contracts do amount to a restraint of *competition*, and do, in the language of the act, as to the partners themselves, "preclude a free and unrestricted competition among themselves."

It is too obvious to require argument for its demonstration that there can be no union or association of individuals in business, or of the business of each of several persons, without the prevention of competition.

Persons who combine, in a partnership, the individual business of each necessarily cease to be rivals and competitors, and, becoming associates, they necessarily thereupon agree both as to to the amount of output and as to the prices at which they shall sell. All these things are within the prohibitions of these laws, and yet such are the results of an ordinary partnership association.

So one of the first stipulations in articles of partnership requires each partner to devote his entire time and attention to the firm and provides that he shall not engage in any business in competition with the firm. Here we find an express agreement to prevent competition. Such an agreement is implied in the very relation which partners occupy to one another. Indeed, it is lawful for partners to agree not to compete with one another in any business whatever.

Matthews vs. Ass'd Press of N. Y., 136 N. Y., 333.

A partnership necessarily restricts competition, both between the partners and generally, for there

are fewer persons engaged in the business carried on by the firm.

The very life of trade in these modern times is dependent upon the great forces and power which can be put into business through partnership and corporate associations. Fearing the growth of such power, many of the States a decade and more ago, actuated more or less by a hysterical impulse, passed these so-called Anti-Trust Laws, believing that all combinations should be destroyed, and the laws then passed have since been continued notwithstanding a large and better comprehension of the laws of trade and a more sane appreciation by legislators of the requirements of modern trade conditions. Through fear of change, these radical measures still continue as threats held over legitimate business enterprises, depriving citizens daily of that complete liberty to contract and pursue legitimate trade, in accustomed methods, without which modern business cannot be carried on.

We may accept it, then, as axiomatic that prevention of competition is the purpose or effect of every copartnership and of every other business association of individuals, corporate or otherwise. Indeed, the application of these laws would prevent a perfectly legitimate covenant in restraint of trade, which any person or association of persons may properly enter into upon a sale of a business and good will, by the terms of which the vendor always agrees not to enter into or carry on the same business within a definite or even an indefinite territory for a term of years fixed by the covenant. A business with its good will could not ordinarily be sold without

such a covenant, and that is the covenant constantly made when the business of individuals is sold and combined in a corporate form. Each individual corporator always makes this restrictive covenant—a restriction probably valid even under the Federal anti-trust act—*U. S. vs. Trans-Missouri Fort. Ass'n*, 166 U. S., at p. 329—that act relating, in terms, only to *restraints of trade.*

The provisions of the act in respect to the regulation, fixing and maintaining of prices are also equally objectionable. A fixed price, agreed upon by the associates in a business, and maintained, is one of the badges of honorable dealing. No partnership can be formed, no association or union of interests can take place, as we have said, without an agreement in respect to the price and the amount and character of the output, that is to say, the merchandise to be manufactured or sold.

No better exposition of the objectionable character of this system of laws can be found than that contained in the opinion of Judge SWAYNE in the *Grice case.* He there said:

> "We will assume that A and B agree to combine their capital, skill and acts, or, in other words, enter into partnership, for the purpose of manufacturing and dealing in certain commodities. They must first necessarily determine the extent of their production, and the price at which they can sell their commodities. Having determined as near as possible the cost of their manufactured products, and the minimum profit necessary to justify the carrying on of the business, they agree that they will not sell their commodities below this

common-standard figure. They fix a figure on which they commence their sales, agreeing to graduate the price, up or down, as the cost of production may vary. Finding after a time their prices too high, and that competitors are underselling their commodities, they lower their prices, and this they may do solely for the purpose of holding the market against competitors. There may be, after a time, an increase in wages, and they agree to increase their prices. There comes an era of hard times, their stock accumulates and is unsalable, and they agree to limit or reduce the production of their commodities. All this they must be able to do, or they cannot carry on their business as partners, yet every one of these agreements, arrangements, undertakings or acts are made criminal by this act. It is absolutely impossible to carry on a partnership business without violating it. If persons combined cannot carry on business without entering into, executing and carrying out contracts, obligations and agreements by which they shall settle the prices of any article as between themselves, or themselves and others, and bind themselves to sell their commodities at a figure, or graduated figure, and not to sell below a common standard figure, or if they cannot carry on business without raising and lowering prices, and increasing and diminishing their productions, at pleasure, then certainly all these things are purposes of their combination. Whether these are the main purposes or purposes essential to the main purposes, is not of the slightest consequence. * * * The vice of the act in question is that it attempts to prevent too much; it does not stop at reasonable limits; it is not content with making crim-

inal general restraint of trade, but it makes criminal all restrictions of trade. It is not content with affixing penalties to acts or contracts which unreasonably restrict competition; it condemns any agreement or arrangement which prevents competition between two or more persons entering into it. It not only prevents competitors from oppressing the public by unreasonable agreements as to production and prices, it also prevents persons associated in interest, joint owners and copartners, from making any agreement about their production and prices. It not only prevents persons from using their capital, skill and acts for the purpose of increasing prices; it reaches the very acme of absurdity in preventing persons from uniting their capital, skill and acts for the purpose of reducing prices. The Legislature perhaps had in mind that which might possibly be a means of public oppression—to wit, the forced reduction of prices of articles which the combination or partnership purchased, but the act does not discriminate between articles purchased and articles sold. And it is because it does not discriminate, because of the want of ordinary care in studying the meanings of words, that we have on the Statute Books of Texas at this close of the Nineteenth Century, during which combinations of capital and skill have cheapened the price of products to an extent unparalleled in the world's history, an act making it a highly penal offence for two or more persons to unite their capital and skill for the purpose of reducing the price of the products which they undertake to manufacture and sell."

In re Grice, 79 Fed. Rep., 627, at pp. 642–3; 644–5.

Indeed, the act affects all agreements between joint owners or persons who have in any way combined their capital or skill. Tenants in common could not possibly agree upon the production of their farms or the prices for their produce without violating the act. The ordinary transactions of bargain and sale, which involve agreements upon prices, are really within the condemnation of the act. There could be no sale without an agreement upon and fixing of prices. As we have seen, agreements for the sale of a business and good will could not ordinarily take place without the necessary accompanying covenants restricting competition.

There is no basis for the assumption that the Legislature could not have intended these results or effects, casting a blight over all business associations and combinations. The Acts are plain and unambiguous in terms. Article 9 of the Penal Code of Texas requires every penal statute to be construed

> "*according to the plain import of the language in which it is written.*"

"No room is left for construction" in such a case.

U. S. v. *Fisher*, 2 Cranch, 358, 399.
McPherson vs. *Blacker*, 146 U. S., 1, 27.

The fact that the Laws of Texas may recognize corporations, associations and partnerships of individuals does not affect the question. The point is, that with reference to the Anti-Trust Acts and the prohibited *purposes* defined in those Acts, there can be no such

thing as lawful corporations, associations or partnerships, or other unions of individuals, *to effectuate, or which naturally would accomplish or promote, such purposes.* The language of the Legislature is general, without any possible limitation, and no court could thrust into the Act any assumed restriction of the perfectly well-understood general terms which are employed. In other words, the court cannot limit what in express terms the Legislature has so plainly left unlimited and unrestrained.

It is not a question merely as to the validity of agreements restricting trade; it is a question involving the validity of agreements restricting *competition*, and providing, as between two or more persons associated in a partnership or otherwise, for the *fixing and regulation of prices and the amount of merchandise to be manufactured and sold.*

The Supreme Court of Texas unquestionably, in *Queen Insurance Company vs. Texas* (86 Texas, 250), recognized the disastrous results which must follow from any proper interpretation of the plain language of these acts, but simply held in that case that insurance was not an article or commodity included in the act.

In *Houck vs. Anheuser-Busch Brewing Association* (88 Texas, 184), however, the court held that *a partnership* agreement for the sale of beer came within the prohibitions of the statutes. The partnership was held to be a prohibited combination. It was found that the brewing company bound itself to sell beer exclusively to a copartnership in the City of El Paso, and this condemned the agreement.

In *Welch vs. Phelps & Bigelow Windmill Company* (89 Texas, 653) it was held that the act did not prevent the principal from agreeing with his agent about the price of consigned goods. The court, however, said the purpose of the act was

> "to prohibit two or more persons, etc., from *uniting or associating* their otherwise independent separate and possibly competing capital, skill or acts for one or more of the five purposes therein specified."

This plainly points to a partnership or any other association of individuals formed by competitors or possible competitors in business.

In *Texas & Pacific Coal Company vs. Lawson* (89 Texas, 394) the court considered the effect of a *lease* of a parcel of land upon which a saloon was to be established, the lease granting the *exclusive right to sell liquors upon lands* of the Coal Company, the rental being "a sum equal to two-thirds of the net profits arising from said business monthly during the term of this lease." As to the liquor business conducted on the premises, this was the practical equivalent of a partnership agreement. The court, in condemning the agreement creating the restriction in the sale of liquors, said:

> "The portion of the Act above quoted denounces as void and prohibits the enforcement at law or equity of every contract whereby a combination of capital, skill or acts is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities. The statute *ignores the common law distinction* between restrictions which are reasonable and those which are

not, and *commodities which are of prime necessity and those which are not.* * * * The word combination as used in the statute means *union or association.* It is clear that the contract provided for and contemplated a union or association of capital and acts by the Coal Company and Lawson. * * *

"In order, however, for the contract to be within the inhibition of the statute the combination must have been formed for one of the purposes therein specified. Was its purpose either to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities? The court has held that, as here used, the word trade means traffic, * * * and the word *commodities means any movable or tangible thing that is ordinarily produced or used as subject of barter or sale.* It is clear, then, that the dealing in liquors contemplated by the contract is a trading, and their purchase and sale is of commodities within the statute. * * *

"We are of opinion that the purpose of the combination was to create and carry out a restriction in the sale of liquors at Thurber, and also to prevent competition in the purchase and sale thereof."

In *Gates vs. Hooper*, 90 Texas, 563, the transaction involved was the sale of a stock of goods by one merchant to another, the vendor agreeing to retire from business in the town in which the business was conducted and to use his efforts to secure custom for the purchaser. The agreement was declared not to be within the act, but the court said (at p. 565):

"In order to constitute a trust within the meaning of the statute, there must be a combination of

> capital, skill or acts by two or more. 'Combination,' as here used, means *union or association.* * * *
>
> When we consider the purpose for which the 'combination' must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of capital, skill or acts denounced is where the parties in the particular case *designed the united co-operation of such agencies, which might have been otherwise independent and competing*, for the accomplishment of one or more of such purposes."

There seems to be a plain recognition in this case that if the merchants in question had entered into a partnership or other association *conbining* the separate business of each, which but for the combination would have been independent and competing, they would have subjected themselves to the penalty of the act. As it was, the decision was made in direct disregard of the language of the court in *Queen Insurance Company vs. Texas*, 86 Texas, 250, at page 264, to the effect that

> "an agreement between two or more persons by which one of them undertakes to bind himself not to follow his trade or to practice a profession in a territory of prescribed limits, is a combination within the meaning of the Statute under consideration."

In *Texas Brewing Co. vs. Templeman* (90 Tex., 277), and *Fuqua vs. Pabst Brewing Co.* (90 Tex., 298), the contracts and decisions were essentially the same. In the case first cited the court said (at p. 280):

"The contract, we think, is a combination of capital, skill and acts. Was the combination unlawful? By the agreement the Brewing Company bound itself to give to Norwood & Co. the sole representation and sale of its products in and near the town of Navasota, and the latter placed themselves under the reciprocal obligation to sell no other beer than that of the Company. The effect of the contract is evidently to create and 'carry out restrictions in trade' and to 'prevent competition' in the 'sale and purchase' of 'commodities'—namely, beer and ice."

The court was here considering one of the ordinary contracts for the promotion of business in a new locality.

The case of *Commonwealth vs. Bavarian Brewing Co.*, 66 Southwestern Rep'r, 1016 (Ky., 1902), involved an indictment for violating a statute similar to the Texas anti-trust acts. A number of brewers made an agreement to add to the price of beer the amount of United States war tax. The court refused to consider the reasonableness of this arrangement, and held that the case came within the statute.

In *American Handle Co. vs. Standard Handle Co.*, 69 Southwestern Rep'r, 709 (Tenn., 1900), under a similar statute, three corporations made an agreement to secure a saving in the selling of their products and in reaching the consumer, by forming a so-called partnership. The court said, (at p. 717):

"It remains to state on this branch of the case that the Standard Company and the Harrisburg Company manufactured only nine or ten per cent. of all the handles made in the world, and that the arrange-

ment made between them and the American had no appreciable effect upon the price of handles in the open markets of the world. It neither increased or diminished such prices, nor did it have any effect upon the price of the raw materials. Nor did it have any effect upon the prices of the local market served by the two Companies prior to the arrangement."

Nevertheless, the agreement was held to violate the statute.

In *Ertz. vs. Produce Exchange Co. of Minn.*, 84 Northwestern Rep'r, 743 (Minn. 1901), the Produce Exchange provided by its by-laws that only a stipulated amount of credit should be allowed to each member by other members; that discrimination in price should be made between members and non-members; that where delivery was agreed upon for Monday, no delivery should be made before that day; and that upon violation of these rules, all other members should cease doing business with the offending member. Under a statute similar to those of Texas, this agreement was held illegal.

See on this point—

Anderson vs. U. S., 171 U. S., 604.

The courts, in these constructions of the act to which we have referred, have not limited themselves to contracts in restriction of trade. They have practically condemned most of the ordinary contracts which are made in the ordinary course of business.

In *Williams vs. Montgomery* (148 N. Y., 519, 525) contracts as to the sale of stocks which were declared

there to be in accordance with "a reasonable, just and honest purpose which the law does not condemn", are clearly condemned by the Texas Statutes.

In *Brown vs. Rounsavell* (78 Ill., 589) and *Newell vs. Meyendorff* (9 Mont., 254) contracts to sell exclusively to one party were held good.

In fact, there is almost no limit to the citations which might be made of cases sustaining contracts amounting to regulations of business which are condemned by the Texas Statutes.

It is clear that these Statutes prevent all contracts and all associations or unions of capital, skill and acts which prevent free and unrestricted competition among two or more persons, thus agreeing to unite the business and acts of each, and that such persons are precluded from having any understandings or agreements whatever in relation to the prices of the articles in which they deal or the amount of the merchandise which they shall manufacture and produce in their united business.

Such a complete and narrow imprisonment of business activities is a violation of the constitutional right of persons to associate and carry on business and enter into contracts therefor, for that right is one of the liberties protected by the Fourteenth Amendment.

The liberty of contract, which necessarily includes the right of men to associate in the conduct of their business and to unite their capital, skill and acts and carry on their business by making the usual and customary agreements in respect to the amount of their output or the price at which they will buy and sell, has

been frequently recognized by this court as a right guaranteed by the Fourteenth Amendment.

In *Allgeyer vs. Louisiana* (165 U. S., 578) this court, speaking of the Fourteenth Amendment, said (at p. 589):

> "The liberty mentioned in that amendment means not only the right of the citizens to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

And, again, the court said (at p. 591):

> "*In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto.*"

In *Butchers' Union Co. vs. Crescent City Co.* (111 U. S., 746, at page 762), this court, speaking by Mr. Justice BRADLEY, said:

> "*The right to follow any of the common occupations of life is an inalienable right.* It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights;

that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

And again, speaking to the same effect, the learned Justice said at page 764:

"I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

There are almost innumerable cases on this subject, especially in the State Courts of New York.

Bertholf vs. O'Reilly, 74 N. Y., 509.
In re Jacobs, 98 N. Y., 98.
People vs. Marx, 99 N. Y., 377.
People vs. Gillson, 109 N. Y., 389.
Forster vs. Scott, 136 N. Y., 577.
Purdy vs. Erie R. R. Co., 162 N. Y., 42, 49.

In *Printing Co. vs. Sampson* (Law Rep., 19 Eq., 462) the court said:

"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into, freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

This right or constitutional liberty of contract has been jealously affirmed and constantly guarded in the different States of the Union. In addition to the cases heretofore cited, we find that in Pennsylvania the

Statute that manufacturers should not pay wages in orders was held unconstitutional as unduly interfering with the liberty of contract.

Godcharles vs. Wigeman, 113 Pa. St. Rep., 431.

In Ohio the same decision was made with reference to a mechanic's lien law.

Palmer vs. Tingle, 45 N. E. Rep., 313.

In Illinois the so-called truck-store act, the coal weighing act, and other similar legislation have been held unconstitutional for the same reason.

Frorer vs. People, 141 Ill., 171;
Ramsey vs. People, 142 Ill., 380;
Harding vs. People, 160 Ill., 459;
Ritchie vs. People, 155 Ill., 98;
Braceville Coal Co. vs. People, 147 Ill., 66.

And in other States similar legislation has been pronounced unconstitutional because violating this fundamental constitutional right of freedom of contract.

Kuhn vs. Detroit, 70 Mich., 534;
Spry Lumber Co. vs. Trust Co., 77 Mich., 199;
State vs. Loomis, 115 Mo., 307;
State vs. Julow, 129 Mo., 163;
State vs. Goodwill, 33 W. Va., 179;
Ex parte Kuback, 85 Cal., 274;
Low vs. Rees' Printing Co., 41 Neb., 127;
In re Eight Hour Law, 21 Col., 29;
Com. vs. Perry, 155 Mass., 117:
2 Eddy on Combinations, §§ 660–673.

As Mr. Tiedeman says in his Limitations of Police Power:

> "Under a constitutional popular government there must necessarily be some limitation. It is a part of the natural and civil liberty to form business relations, free from the dictation of the State, that the like freedom should be secured and enjoyed in determining the condition and terms of the contract which constitutes the basis of the business relation or transaction. It is therefore the general rule that a man is free to ask for his wares or his services whatever price he is able to get and others are willing to pay." (p. 233).

And again, in Section 1 of the same work:

> "Any law * * * which undertakes to abolish rights, the exercise of which does not involve an infringement on the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government."

And still again on pages 197 and 198:

> "It is also a judicial question whether the police regulation extends beyond the threatened evil and prohibits that which involves no threatening danger to the public. If it is unconstitutional to impose police regulations upon an innocent calling, it must be likewise unconstitutional to place an occupation under police restraint beyond what is necessary to dissipate the threatening evil. The Legislature has the choice of means to prevent evil to the public, but the means chosen must not go beyond the

prevention of the evil, and prohibit what does not cause the evil."

It is unnecessary to cite authorities at length in support of the proposition that the Legislature cannot under pretense of exercising its police power prohibit harmless acts not immediately concerning the health and welfare of the people, and that all such acts are subject to judicial examination and possible condemnation.

22 Am. & Eng. Ency. of Law, 936, *et seq.*

In *People vs. Gillson* (109 N. Y., 389, at p. 400), the Court of Appeals of New York, speaking through Mr. Justice PECKHAM, then a member of that court, said:

"This brings us to the consideration of the question whether the act is valid as a proper exercise of what is, by way of classification, called the police power of the State. That power has never yet been fully described nor its extent plainly limited further, at least, than this; it is not above the Constitution, but it is bounded by its provisions; and if any liberty or franchise is expressly protected by any constitutional provision it cannot be destroyed by any valid exercise by the Legislature or the executive of the police power. The extent of this power has been the subject of discussion in this court, and in the recent and most important case of *In re* Jacobs (98 N. Y., 107) the question was examined and most exhaustively reviewed by EARL, J., in his opinion. To reopen the subject now would be useless, and I refer to that case as authority for the statement that the Legislature cannot, without reason and arbitrarily, infringe upon the liberty or the property rights of any person within the pro-

tection of the Constitution of this State; and that if the Legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the courts."

See, also:

Colon vs. Lisk, 153 N. Y., 188, and cases there cited.

As the court said in the case last cited, the police power

"must be exercised subject to the provisions of both the Federal and State Constitutions. Laws passed in the exercise of it must tend towards the preservation of the lives, health, morals or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power (Health Department vs. Rector, 145 N. Y., 32, 39)."

As this court has said:

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the *supreme law of the land*, anything in the Constitution or statutes of the States to the contrary notwithstanding, *a statute of*

> *a State, even when avowedly enacted in the exercise of its police powers, must yield to that law.* No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons vs. Ogden*, 9 Wheat., 1, 210; *Sinnot vs. Davenport*, 22 How., 227, 243; *Missouri, Kansas & Texas Ry. vs. Haber*, 169 U. S., 613, 626. *Connolly vs. Union Sewer Pipe Co.*, 184 U.S., 540 (at p. 558):

As to an attempt to distinguish between corporations and individuals in this connection, the Supreme Judicial Court of Massachusetts has said:

> "*We know of no reason derived from the constitution of the Commonwealth or of the United States why there must be a distinction made* in respect to such legislation *between corporations and persons* engaged in manufacturing, *when both do the same kind of business.*"

Of course, in the exercise of its charter powers, a corporation must receive precisely the same protection, under the Fourteenth Amendment, as any other person.

Police power and public policy may go hand in hand, but constitutional rights cannot be destroyed by an arbitrary reference to either as a sanction for legislation. The courts must in each case be satisfied that the restriction of liberty in the exercise of the police power is pursuant to a definite public policy and is necessary for the public welfare.

It has never been held to be contrary to public policy for persons to combine their capital, skill or acts for the purpose or with the effect even of preventing competition among themselves, or otherwise, or for the purpose or with the effect of fixing and regulating prices of their merchandise and the amount of their output or manufactured product. Certainly no court has ever held it to be contrary to public policy to unite the interests of persons in business in such manner that prices of their product or the merchandise in which they deal is "affected." From the days of Magna Charta all these things have been permissible and in accordance with public policy. The right of association for these purposes or with these results has never been questioned, and from the beginning, in accordance with the natural laws affecting trade and business, there has been not only association but a continuous increase in the number, size and scope of associated enterprises. The whole growth and expansion of the Anglo-Saxon race, so stupendous during the last half century through the medium of improved machinery and the developments made possible by railroads, steamship lines, the telegraph and telephone, and improvements in electrical appliances, would have been

quite impossible without this wholly unrestricted right of association and freedom of contract in business relations. It is only by this constant and increasing combination by individuals of their capital, skill and acts—combinations which are in terms absolutely condemned by this system of laws of the State of Texas—that this development has been maintained. Of course such combinations have regulated and fixed prices with the effect during the last generation of *reducing* (a purpose condemned by the Texas acts), to an extent almost undreamed of fifty years ago, the prices of the necessaries of life and of those commodities more commonly used by the people at large. The Texas laws, like all the others of these hysterical anti-Trust ebullitions on the part of many of the States, absolutely strike down all association and combination which has heretofore promoted to such a wonderful degree the welfare of the race, and force us back to an era of semi-barbarism where the rule of individualism—each man for himself—prevailed, and the community was absolutely dependent upon selfish individual industry.

In the history of laws bearing upon trade relations, we find it demonstrated that under the common law there was no such thing as restriction of competition. Restraint of trade and restriction of competition were two different things, and competition was restricted only by purely statutory regulations. For many years in the early history of the law there were many mad attempts to regulate and control trade, chiefly, however, in articles of prime necessity, but throughout there has always been a plain recognition of the right and free-

dom to form associations and unions of capital and effort.

As this court, speaking by Mr. Justice PECKHAM, remarked in *Anderson vs. U. S.* (171 U. S., 604), at p. 616:

> "From very early times, it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together."

In *U. S. vs. Joint Traffic Association* (171 U. S., 505, at p. 567), in discussing the liberty of contract as effected by the power of Congress over Interstate Commerce, and in answering the argument that the construction placed by the court upon the Federal Anti-Trust Act really condemned all of the familiar business contracts enumerated by counsel, such for instance as the formation of corporations and partnerships, withdrawals from business with covenants restraining the vendor from thereafter entering into the same business, sales of a business with its good will, with the usual restrictive covenants, the court declared that no contract of such a nature was before the court, and said:

> "Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never to our knowledge been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

> "We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term, and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the Act."

The court then added that these instances cited by counsel had no bearing upon the real question in *that* case, that is to say, the power of *Congress* to regulate such contracts or any contracts when operating directly and immediately in restraint of trade or commerce among the states.

We quote this portion of the opinion merely for the purpose of showing that this court has recognized the legality, so far as the ordinary and familiar common law doctrine of restraint of trade is concerned, of the associations, and contractual relations referred to.

It will be borne in mind, however, constantly, that the Texas system of laws in question absolutely prohibits these relations, which under the common law have always been legal, not where they restrain trade merely, but where they restrict competition, and also where they accomplish—what has heretofore been held to be perfectly legal—the regulation of prices and the output by the corporation, partnership or association, or through the medium of the covenant, in question in the particular case. No two persons, no two partnerships, no two associations can unite interests under the

laws of Texas for any of these common business purposes. These laws are not police regulations. They are the mere whimsical exercise of arbitray power.

At the foundation of all the statutes against trade combinations lies the idea that prices can be regulated by law. In a brief review in the second chapter of Thorold Rogers on "The Economical Interpretation of History" it is said that laws fixing prices on wheat and beer are so old that they are undated. An example of early statutes is 37 Edw. III., which fixes the prices of poultry, regulates the diet and apparel of servants, ordains that handicraftsmen shall use but one mystery, and is also the first statute against engrossing to enhance prices.

By very early statutes local authorities were empowered to fix prices on almost all products. Many statutes were enacted regulating prices of meat and clothing. Early attention was paid to the rate of wages, because prices were supposed to be dependent upon wages. The first of the infamous Statutes of Laborers was 23 Edw. III., A. D. 1349. This punished employees for taking wages higher than those fixed by law, and employers for paying them. It also attempted to compel the sale of all manner of victual at reasonable prices. It was but natural that workmen should combine against such laws, and consequently in a new Statute of Laborers, 34 Edw. III., A. D. 1360, we find the first statute against association, in the provision that alliances, covines, congregations, chapters, ordinances and oaths made, or to

be made, by masons or carpenters, should be void and annulled. This provision is contained in a statute which prescribed that fugitive laborers should be branded with the letter F. The Statute of Laborers was amended and re-enacted in various reigns with divers provisions against confederacies of workingmen. 3 Hen. IV., C. 1, was an act against confederacies and yearly congregations of masons in general chapters, and 15 Hen. IV., C. 6, prohibited guilds of laborers and artificers. From 23 Edw. I. to James I., thirty-seven acts against laborers were passed. All were repealed and a new one framed, 5 Eliz., C. 4. This system of infamous laws which enslaved the laborer was not finally swept from the statute books until 1825.

During the same periods numerous other statutes were passed fixing prices upon products, endeavoring to prevent enchancement of prices, and in some cases to prevent lowering of prices. They are too numerous for enumeration. They will be found in "Pickering's Statutes," and many of them are referred to and quoted in an able and interesting work by Mr. Albert Stickney, of the New York bar, entitled "State Control of Trade and Commerce." The best known of the statutes of this character is 5 and 6 Edw. VI., C. 14, relative to forestalling, regrating and engrossing, which act created a variety of offenses, even punishing such persons as were guilty of "making any motion by word, letter, message or otherwise for the enchancing of the price or dearer selling of anything or things above mentioned," and also those who got "into his or their hands by buying, contracting, or promise-taking to the intent to

sell again." In relation to all of these acts, it may be said that they prevented dealings by wholesale, and are utterly incompatible with modern business. They were all, some thirty-six in number, swept away by the statute 7 and 8 Vict., C. 24, with the confession that they created the evils they sought to alleviate.

The offenses of the character above enumerated, created by statute, became known as "offenses against trade." The persons who, through a union of capital, skill or acts, produced any of the prohibited results became guilty of a conspiracy against trade.

In the Law of Criminal Conspiracies and Agreements, by R. S. Wright, p. 12, n. 6, it is stated that the crime of conspiracy is statutory, and not of common law origin, and that the different statutory laws relative to conspiracy were enacted in aid of statutes such as these enumerated, as, for instance, the various Statutes of Laborers, the Statute of 27 Edw. III., A. D. 1353, making it a felony for merchants to make "conspiracy, confederacy, covine, imagination, evil device or murmur," for the disturbance of the staples and of the price of wool, and many similar acts. Whether this be correct, or whether the crime of conspiracy ante-dated the statutes, it is evident that conspiracy against trade once embraced scores of statutory offenses not now recognized.

The Right to Form Partnerships Always Existed. Amid all this madness of legislation, and during the centuries when a mistaken belief prevailed that any alliances, covines or associations of persons engaged in business had the tendency to injuriously affect prices and interfere with trade, the right to form

partnerships in business existed and was recognized as a common law right. This is evident from the fact that no case has been found in which the right has been questioned. It is evident also from the few statutes by which the right was limited. Of these we have discovered only two, but it is probable there were others. The statute, 28 Geo. III., C. 53, declared it an unlawful combination for five or more persons to unite in covenant or partnership to purchase coals for sale. The statute, 17 Geo. III., C. 42, prevented combinations by copartnership, or otherwise, in the purchase or sale of bricks.

Copartnerships were therefore recognized as combinations which prevented competition and affected prices. How could it be otherwise? And yet in spite of a frenzy in relation to combinations to affect prices, which Adam Smith compared to the witchcraft craze, the partnership remained unmolested. For this no other reason can be given than that the right to form partnerships was a portion of that liberty which was secured by Magna Charter, of which no freeman might be deprived. "*Nullus liber homo*," *&c.* These words, says PARKER, C. J., in *Mitchel vs. Reynolds*, 1 Smith's L. C., 511, "have been always taken to extend to freedom of trade." Therefore Parliament, in its omnipotence, respected the right, and even Judges affected by the prevailing craze permitted it to exist unchallenged.

The laws relative to partnership existed, as Lord COKE said, "*per legem mercatoriam*, which, as hath been said, is part of the laws of this realm for the advancement and continuance of commerce and trade,

which is *pro bono publico*." And so the right of association in business continued as one of the sacred liberties of free citizens almost untouched through all those centuries in which, as Buckle says,

> "every European government, which legislated respecting trade, acted as if its main object was to suppress the trade and ruin the traders. Laws to regulate wages, laws to regulate prices, laws to regulate profits; interference with markets, interference with manufactories, interference with machinery, interference even with shops."

CORPORATIONS. The long-continued battle against corporations, while partnerships went unscathed, shows that it was not combinations *per se*, but peculiar methods of combination, which excited legal animadversions. Corporations could only be created by king's patent, or act of Parliament. Consequently there was no need of anti-corporation laws.

Most corporations were, in fact, monopolies by virtue of their charter, but corporations, as such, were denounced as tending to obstruct the free use of labor, as limiting competition, as putting down individual industry, and affording facilities for combinations among tradesmen for defrauding the public. The subject is discussed by Adam Smith and other political economists. But corporations vindicated their right to exist, notwithstanding these fears.

JOINT STOCK ASSOCIATIONS. One form of partnership was condemned by law in a manner which suggests the statute under consideration—namely, a partnership with transferable shares, or a joint stock association.

The statute, 6 Geo. I., C. 18, declared associations for commercial undertakings with transferable shares to be a common nuisance, and inflicted the penalty of imprisonment for life and confiscation of goods. Even this severity of punishment has been imitated in the Texas act. This statute, which is known in history as the "*Infamous Bubble Act*," was, during its existence, a dead letter and was long ago repealed.

Joint stock associations existed in spite of it. Otherwise England's rapidly developing industries could never have been carried on. Few persons were convicted under it and none were punished. The law was simply futile, says Lindley in his work on Partnership (p. 6). In fact, it is doubtful if these old statutes relative to combinations to enhance prices were ever enforced. An investigation confirms what is said by Stickney in the work above cited:

> "The reports of cases in the English Courts show an almost entire absence of even so much as an attempt to enforce these old statutes. In time, by common consent, the statutes making such combinations criminal became obsolete. It was found by experience that they could not be enforced, and that their mere existence, with occasional sporadic attempts at enforcement, did more harm than good."

The cases arising under the *Bubble Act* seem to be the first in which it was urged that whatever interfered with competition is contrary to law.

CASES UNDER THE BUBBLE ACT: In *R. vs. Webb*, 14 East, 406, and *Pratt vs. Hutchinson*, 15 East, 511, it was strongly urged that the grouping together of num-

bers of persons, with transferable shares, for the purpose of carrying on trade, was calculated to put down individual industry and competition. It was said "if fifty persons may do this, why may not a thousand?" This argument of danger in numbers applies to an ordinary partnership as strongly as to a joint stock association. It did not prevail with the court in those cases. It is true that Lord ELDON was of the opinion that companies with large capitals and with transferable shares were injurious to the public and illegal, independent of the act referred to (1 Lindley on Part., 193), but this opinion did not prevail, and such associations, after some fluctuations of opinion, were finally held to be legal unless affirmatively shown to be of a dangerous or mischievous character (1 Lindley on Part., 194).

Thus it is evident that, while the statutory law and the dicta of Judges in some cases went to absurd lengths against certain *forms* of association, the *right* of association, notwithstanding the recognized and established fact that it limits competition, was never denied, and has existed under the protection of law from the days of the infancy of the law merchant until the present time. Never, either by common law or by statute law, were all agreements in restriction of competition illegal. Such agreements were among the most ordinary and necessary in commercial life, and the right to enter into them was one of the most cherished liberties of the citizen.

The court, by BOWEN, J., in *Mogul S. S. Co. vs. McGregor*, 23 Q. B. D., 598, at pp. 617–618, stated a

principle which was always a principle of the common law, as follows:

> "The truth is that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse for the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence—to use a technical expression—of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would in the present day be impossible—would be only another method of attempting to set boundaries to the tides."

This case is authority, if authority could be needed, for the proposition that combinations which restricted competition, and which prevented competition between the persons combined, never were illegal by the common law of England. This conclusion cannot be doubted when it is remembered that the statute laws of England never went to the length of preventing all association.

AMERICAN CASES: We now desire to review briefly the American cases in regard to restrictions of competition.

It will not be questioned that the right of persons to associate themselves and their capital and skill has existed in this country from the earliest colonial times, and has been exercised to a greater extent than in any other country. All the important business of the land is conducted through firms, associations and corporations. If there are cases which decide combinations in restriction of competition to be illegal, they are in direct variance with the industrial history of the country and with the statutes of all our States which authorize the creation of partnerships and corporations. But an examination of the cases will show that it is not association *per se*, but only certain *forms* of association which have been condemned. The language of Judges may have been broader than this, but such language must be qualified in its application to the particular facts of the cases in hand.

The first American case in which an opinion was enunciated, which, carried to its full extent, would be fatal to association, was *Hooker vs. Vandewater*, 4 Denio, 349.

The court (JEWETT, J.) says (at p. 353):

> " It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious, if not fatal, to it."

This is the first case in which we find this language used. The familiar maxim is ancient enough, but the conclusion that " whatever relaxes competition in trade is injurious, if not fatal, to it," seems to have been an original deduction of the Judge in the case, and can

hardly be accepted as conclusive either in law or economics.

The citation of authority for this language is *People vs. Fisher*, 14 Wend., 9. *People vs. Fisher* was an indictment for a conspiracy of shoemakers to raise wages by striking, and was sustainable, if at all, on the ground that the workmen used illegal means to accomplish a legal purpose. It did not use, and was never authority for, the language quoted. *Hooker vs. Vandewater* was the case of a pooling agreement between several individuals and firms, the proprietors of five several lines of boats on the Erie and Oswego canals. They did not unite their capital, skill or acts. They were competitors and pooled their profits solely for the purpose of controlling or raising prices, which were to be established by agreement of all the parties interested. The language of the court must be interpreted in its application to the case, and, being so interpreted, means only that pooling agreements between competitors for the purpose of controlling prices are contrary to public policy. This is very different from a combination of persons, capital, skill or acts in one firm or corporation, by means of which parties cease to be competitors and work for a joint interest.

The case of *Stanton vs. Allen*, 5 Denio, 434, was likewise a pooling agreement among the proprietors of boats on the Erie and Oswego canals, by which they regulated the price of freight and passage by a uniform scale, and divided the profits according to the number of boats employed by each. There was no common ownership of the capital employed; there was no union

of persons, skill or acts. Firms which were separate remained separate, and each continued to carry on its own business separately. If the statute only condemned such agreements not a word would be said against its constitutionality.

An early and important case, which clearly notes a diversity between the kinds of combinations which destroy competition, is *Com. vs. Carlisle*, Brightly (Pa.), 36. That noted jurist, Judge GIBSON, says (at p. 40):

> "If a number of persons should combine to establish a ferry, not from motives of public or private utility, but to ruin or injure the owner of a neighboring ferry, the wickedness of the motive would render the association criminal, although it is otherwise where capital is combined, not for the purpose of oppression, but fair competition with others of the same calling."

And again (p. 41):

> "An association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual. The combination of capital for purposes of commerce, or to carry on any other branch of industry, although it may in its consequences indirectly operate on third persons, is unaffected by this consideration, because it is a common means in the ordinary course of human affairs which stimulates to competition and enables men to engage in undertakings too weighty for an individual."

In the case of *Central Ohio Salt Co. vs. Guthrie*, 35 Ohio St., 666, thirty or more persons, firms or corporations who were and continued to be engaged separately in the manufacture of salt entered into a pooling agreement for the sole purpose of regulating prices, and for that end placed the business of receiving and distributing the salt manufactured by the different concerns under the control of five persons, to be chosen annually.

The language used by the court in regard to the restriction of competition must be interpreted with reference to the nature of the agreement, which was a pooling agreement between competitors, and not a union of capital, skill or acts in a partnership.

The same is true of—

Emery vs. The Ohio Candle Co., 47 Ohio St., 320.
Morris Run Coal Co. vs. Barclay Coal Co., 68 Pa. St., 173.
India Bagging Association vs. Kock & Co., 14 La. Ann., 168.
U. S. vs. Jellico Coal Co., 46 Fed. Rep., 432.
Lumber Co. vs. Hayes, 76 Cal., 387.
Craft vs. McConoughy, 79 Ill., 346.
Gibbs vs. Gas Co., 130 U. S., 396.

and many others. All were cases of contracts between competing companies which did not unite their capital, skill or acts, but only agreed as to prices and production and the pooling of their receipts. As was said by SANBORN, J., in *U. S. vs. Trans-Missouri Freight Association*, 58 Fed. Rep., 58 (at p. 70):

> "In none of these cases were they [the courts] required to hold, and in none of them did they

hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal."

It is easy to refer to many cases to show that a multitude of contracts and combinations which restrict competition are legal, not taking into consideration the ordinary commercial partnership, which has never been questioned in any court, or joint stock associations or corporations, which are authorized by statute in every State.

It is not necessary to cite the cases which hold contracts in reasonable restriction of trade to be legal, although all such contracts are in restriction of competition. The leading case of *Mitchel vs. Reynolds*, 1 P. Wms., 181, held that a contract, which clearly restricted competition, was not illegal. A multitude of other cases will be found collected in the opinion in *U. S. vs. Trans-Missouri Freight Association*, 58 Fed. Rep., 71 and 72.

In *Marsh vs. Russell*, 66 N. Y., 288, a distinction between legal contracts in restraint of competition and illegal contracts in restriction of trade was clearly set forth as follows: When a lawful business is carried on by a firm—

"its members could regulate the price at which they will buy and sell. * * * Suppose they had formed a partnership to buy and sell wheat, how can it be doubted that they could lawfully agree in their articles of copartnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price nor sold for less than a

certain other price? Such an agreement would certainly not upon its face be unlawful."

Parties associated for a reasonable and honest purpose may agree not to compete.

Phippen vs. Stickney, 3 Met., 384.

Two firms were competitors in the business of transportation. As such they could not enter into an agreement not to compete or to fix prices. But they agreed to organize a corporation to conduct the business theretofore conducted by the competing firms. This was held to be legal.

Lorillard vs. Clyde, 86 N. Y., 384.

Central Shade Roller Co. vs. Cushman, 143 Mass., 353, holds that competitors may agree to form a corporation for the purpose of preventing competition.

In *Craft vs. McConoughy*, 79 Ill., 346, the court points out that "a partnership had not been formed for the purpose of trading in grain, but only a secret combination to enable the parties, by secret and fraudulent means, to control the prices of grain."

In *Diamond Match Co. vs. Roeber*, 106 N. Y., 473, the court says:

> "We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties."

"Whether competition in this particular business would be a public benefaction, or its restraint a source of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil."

Leslie vs. Lorillard, 110 N. Y., 519, at p. 534.

In *Matthews vs. Associated Press*, 136 N. Y., 333, the defendant was a corporation organized for the purpose of collecting news for publication in the newspapers which composed its membership. It adopted by-laws prohibiting its members from receiving, or publishing, the regular news dispatches of any other news association covering a like territory and organized for a like purpose. The court held that the by-law was reasonable and valid. It said:

"The greater the number belonging to the organization, the larger will be its income, and the greater amount it will be able to spend for making the collection of news, and the more efficient and valuable such collection will be. *To suppress competition in such chosen field among themselves* and to thus enhance the value of the property and the conveniences arising from the extended use of the means and opportunities of the association, it would seem most appropriate to provide that the members of such association should not take news from any other" (p. 341).

"Associations are so common an element, not only in commerce, but in all the affairs of life, that

it would be rather perilous on the part of the court to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality."

Jones vs. Fell, 5 Fla., 510, 515.

"As a matter of fact, nearly all enterprises in this State, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads and cross mountains and deserts with them; they erect churches, colleges, lyceums and theatres; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing that is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations."

Mr. Justice FIELD in *Railroad Tax Cases*, 13 Fed. Rep., 722 (at p. 743):

In the opinion below in *United States vs. Addyston Pipe & Steel Co.*, 85 Fed. Rep., 271, Judge TAFT reviews a multitude of cases, and endeavors to extract from them established principles on the subject of restraint of trade. The opinion would have been clearer had the proper distinction been drawn between restraint of trade and restraint of competition. It is only under exceptional circumstances, as the opinion clearly shows, that restraint of competition is restraint of trade. As the learned Judge well says, page 280: "when two men become partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise and energy to carry on a successful business and one useful to the community." Again (p. 281) he enumerates several agreements in restraint of competition which are not in restraint of trade, showing further (p. 290) that agreements in restraint of competition are in restraint of trade only where there was no relation of partnership, or of vendor or vendee, or employer or employee between the parties. To this he might have added other relations recognized by law, such as corporators, co-owners, joint tenants and tenants in common.

The foregoing citation of authorities is solely for the purposes of showing that which does not seem to be in need of proof, that is to say, that associations restrictive of competition were not void at common law, but that on the contrary combinations restrictive of competition have always been upheld by law, and that the right to

combine is to be classed among the most important and least questioned liberties of citizens.

These distinctions are brought out by Mr. Justice HOLMES in his dissenting opinion in *Northern Securities Co. vs. U. S.*, 193 U. S., at p. 400.

All that this Court has ever held on this subject of restrictions of competition is limited solely to their effect upon *interstate commerce* in cases arising under, and requiring a construction of, the *Federal Anti-Trust Act.* Having declared that Congress intended to prohibit *all* restraints upon that commerce, whether reasonable or unreasonable, the Court has simply held, as to competition—

> "that to destroy or restrict free competition *in interstate commerce* was to *restrain such commerce*"—

within the meaning of the Federal Act.

> *Northern Securities Co. vs. U. S.*, 193 U. S., at p. 337.

Obviously, that is because a restriction of competition may directly produce *some restraint* of commerce, and because *any* restraint of *interstate* trade and commerce, however reasonable, is unlawful. At common law, and for all time heretofore, however, such a *reasonable* restraint of trade was always lawful.

When it was held by this court in *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290, that an Act of Congress made criminal restraints of interstate commerce whether reasonable or unreasonable, great apprehension was created in the minds of men engaged in trade lest contracts necessary in business, and harm-

ful to no one, might be found to be criminal. This, possibly, led this Court to say in *United States vs. Joint Traffic Association*, 171 U. S., 505, 568:

> "To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

Admitting fully the existence and broad scope of the right to property and the liberty of contract protected by the Constitution in both the Fifth and Fourteenth amendments, the only limitation that this court has ever placed upon the right has grown out of its recognition and assertion of the paramount power of the national government, acting through Congress, to legislate on the subject of interstate commerce and therefore to limit and restrain the private right and liberty of contract, whenever such private contracts have direct relation to, or immediately affect and bear upon, interstate commerce.

U. S. vs. Joint Traff. Ass'n., 171 U. S., 505, 559, 566–572.
Addystone Pipe & Steel Co. vs. U. S., 175 U. S., 211, 227-235.
Northern Securities Co. vs. U. S., 193 U. S., 197, at p. 351 (HARLAN, J.).

In other words, this court finding two clauses of the Constitution expressly covering the subject, holds that

the guaranty of liberty of contract in the citizen must yield to the paramount power over interstate commerce conferred upon the national Government.

Having in mind the admitted liberty of contract involving the right to the pursuit of happiness in carrying on the different lawful vocations of life in the customary way, long known to the ancient common law, through the medium of partnership and other associations and combinations and unions of acts and skill referred to in these laws of the State of Texas, we find that those laws have restricted and impaired that right, have qualified and limited the common law doctrine of restraint of trade, have introduced restrictions in competition, have made it impossible to regulate the prices and output of merchandise in the ways common among business men associated together, and, through their qualification of this liberty of contract, have, by their plain terms, made it impossible to carry on the ordinary business of life in these customary ways always sanctioned under the institutions of the Anglo-Saxon race. And this has been accomplished by arbitrary statutory prohibitions having no relation whatever to subject-matters affected by association and combination which might, by any pretence, injuriously affect the public health or welfare. The usual police regulation, *limited to what is injurious to the public*, is no part of these sweeping prohibitions.

Consider what apprehension (beyond anything resulting from the Anti-Trust decisions of this court) must be felt if now it be held that the State legislatures may make criminal all contracts and associations restrictive

of *competition*, whether they be reasonable or unreasonable; that two men may not enter into any combination, partnership or agreement which precludes free and unrestricted competition between themselves or themselves and others; and that men may not make any agreements as to prices or output, or unite any interests which may affect prices. If the liberty which our Constitution guarantees does not protect the men who conduct the business of this country against such absurd and dangerous legislation, it is but an empty formula instead of a substantial safeguard upon which the citizen may rely.

Speaking generally of the right and liberty of contract of corporations, as well as of individuals, in their dealings with and use of their property, it is settled that there can be no direct or other interference with this right, or with any other vested property right, except in the proper exercise by a state of its police power, which must, in all cases, be limited to matters plainly affecting the life, health, morals, peace, good order, convenience and general welfare of the community.

See—

2 Eddy on Combinations, § 658, *et seq.*, § 676–678, *et seq.*

22 Am. & Eng. Ency. of Law, 936, *et seq.*

It requires no argument to show that this sweeping legislation in question has no relation whatever to any of these matters affecting the general welfare. It is nothing but a heterogeneous collection of purely arbitrary prohibitions upon the use of property and upon the liberty of contract in dealing therewith.

A striking commentary in this respect upon this unreasoning and fantastically devised system of legislation is furnished by the contrasting action of New York and other conservative states.

As an illustration: The Penal Code of the State of New York, and the original laws revised by that Code, have definitely fixed and expressed the public policy of that State in respect to combinations and conspiracies. That Code declares (§ 168, Sub-div. 6) that it is a misdemeanor for two or more persons to conspire—

> " to commit any act *injurious* to the *public health*, to the *public morals*, or to *trade or commerce*."

Here we find the expression of a proper and legitimate provision for the protection of the public, the legality or illegality of the combination or conspiracy depending entirely upon the question, whether or not its objects and purposes are " *injurious* to the public health, public morals, or to trade or commerce." Those are precisely the matters to the protection of which a State should properly address itself. The State of Texas, however, by the extraordinary laws here in question, has attacked every conceivable kind of contract tending to accomplish the purposes specified in those laws, *without any regard whatever to the question whether they are injurious to the public or to trade or commerce;* and in this we find the condemnation of this and all similar systems of law.

The State of New York has also forbidden any agreements and combinations restricting competition in any " *article of common use*," or any " *necessary of life*,"

and any agreements creating *monopolies in such articles*, and, on the part of corporations, all agreements creating *monopolies* in restraint of trade, or restricting competition, in any "*necessary of life.*"

See Birdseye's Statutes—"Monopoly."

It is also a subject for grave comment, as demonstrating the purely arbitrary and discriminating nature of this anti-trust legislation, that the statutes are limited in their application—so far as concerns their operation upon commerce, or business, or upon agreements affecting prices or competition in manufacture—to "*merchandise, produce or commodities*," and to the fixing of rates for *transportation* and for *insurance premiums*. One State (Washington) has included the price of professional services. Referring to this arbitrary legislation and classification with respect to the operation of the statute, Mr. Freund in his recent work on the Police Power, with special reference to the condemnation by this court of the discriminating classification worked by the exemption of agriculturists and laborers from the operation of the Illinois anti-trust law, says:

> "In view of this decision, doubts may be entertained even with regard to those statutes which cover all articles of *merchandise*, for *why should an exception be admitted for other charges?*"
>
> Freund on Police Power, § 356, page 354.

There is certainly not in the nature of things, and, so far as appears, there was nothing before the Legislature of Texas, justifying the classification of these enumerated subject-matters in this law, and the con-

sequent discrimination against them and in favor of the numerous other subject-matters for regulation, with respect to price and cost, with which the inhabitants of that State, in common with those of all other States, are constantly dealing. The stock in trade of a manufacturing or merchandising corporation is its goods or product. That of the professional man is his equipment of knowledge and experience. And so we might proceed enumerating other subject-matters which should naturally and consistently be included by such extraordinary legislation; and yet agreements and combinations, with reference to the cost, price or charges concerning these other matters, are not contained in this act. It is in this respect purely fragmentary, arbitrary and discriminating.

The Act of 1899, like the other anti-trust laws of the State, is an arbitrary attack upon property, and upon those rights to use and deal with property which have been recognized and sanctioned since the time of Magna Charta. Such rights, including the right to associate in business, to unite business interests, to fix by agreement the prices of merchandise, and to regulate the amount of output, *this long recognition and sanction has demonstrated, cannot possibly be injurious to the public welfare or to any extent a burden upon the community.* An *abuse* of these rights, like any others, may be properly regulated, when it becomes distinctly dangerous to the public, but that requires legislation *aimed at the abuse.* Here, we have nothing but a *wholesale condemnation* of *all* acts of a given class, committed by *all* persons, without regard to circumstances,

or to the question of public injury or the general welfare—a question which is always open to judicial scrutiny.

The freedom of association in trade and the freedom of contract, which the common law world has thus sanctioned for centuries, cannot be arbitrarily struck down by the State of Texas. That sanction conclusively establishes the fact that there is no public injury, and the State does not pretend to regulate any defined abuses. There is, therefore, no attempted exercise of the police power—proper or improper. This arbitrary and sweeping law is therefore condemned by the Fourteenth Amendment.

Respectfully submitted,

WILLIAM V. ROWE,
RALPH OAKLEY,
JAS. A. BAKER,
R. S. LOVETT,
Counsel for Plaintiffs in Error.